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Yakima, Washington, Monday, March 17, 1947  
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: May it please the Court, this morning again I received an additional telegram from Mr. King, the witness that I had subpoenaed, and at one time I had arranged to have his testimony on Thursday, on account of his physical condition, and he left Wednesday evening. He arranged to be back here Sunday evening, last evening, to be present in court this morning. He says "Because of physical condition I regret it is not advisable for me to come to Yakima at this time"; and I would therefore respectfully make application, in the event I am unable to have him clear with his doctor so he could be here, that we could take his testimony before you in Spokane, if it would be possible. I'm just disappointed, that's twice I've been disappointed, and still I do know the man's arm is in bad shape.

The Court: Where does he live?

Mr. Holman: Cheney, your Honor.

The Court: What will he testify to here?

Mr. Holman: May I have just a minute, your Honor, [1900] to find that?

The Court: Yes. Where was he subpoenaed, Mr. Holman?

Mr. Holman: He was subpoenaed in Cheney.

The Court: Too far to compel him to attend, is that true?

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Mr. Holman: Wait just a minute, your Honor. He was subpoenaed here; he was in the courtroom here. I am sure the Marshal subpoenaed only Mr. Black away from here, your Honor.

The Court: Let me see his telegram. He hasn't any doctor's certificate attached to it, or anything of that sort.

Mr. Holman: Oh, no. I read one before to your Honor.

The Court: Well, obviously his testimony couldn't be taken before me in Spokane without continuing this case until some future date; that would involve a continuance.

Mr. Holman: Yes. I just received that this morning.

The Court: I think these people who are bringing this case under the Miller Act are entitled to have it determined within some reasonable time. It's already gone beyond a reasonable time. I'm not inclined to grant [1901] any continuance. If Mr. King is unable to attend, perhaps you can get counsel to stipulate what he will testify. If he is physically able to attend, and doesn't want to be inconvenienced, then an application to adjudge him in contempt would be in order here.

Mr. Holman: Your Honor, I'll call Mr. King at noon and advise your Honor further.

The Court: I won't grant any continuance in this case, and we're going to start longer sessions. We're going to continue until 4:30 today, and convene at 9:30 tomorrow morning. How long we go



tomorrow will depend on how we get along. I would suggest you have your witnesses here more rapidly than one every other day.

Mr. Holman: I have my witnesses here.

The Court: I am happy to hear that.

Mr. Holman: Your Honor asked me what the testimony was of Mr. King, but I take it now I'll hold that and talk to counsel; we may be able to stipulate. Call Mr. Staples to the stand.

### GEORGE STAPLES

recalled as a witness on behalf of the defendants Macri, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Mr. Staples, you have already testified here. After you had lined out the job, who was employed for the purpose of building the forms? [1902]

A. John Klugg as carpenter foreman, and Robert Monrad.

Q. Now, what arrangement was made as to the plan of building forms with respect to the line of structures? What were your instruction to them?

A. Well, we were to follow down from the structures——

Mr. Olson: I object as being immaterial, if the Court please, what instructions Mr. Staples gave to Mr. Klugg and Mr. Monrad. This was at a time, as I understand, when they were under his employ.

(Testimony of George Staples.)

The Court: That was before Schaefer started in. What is the materiality of that Mr. Holman?

Mr. Holman: Merely to show the manner, the type of forms being constructed, your Honor, at the time Mr. Schaefer took them over as testified by Mr. Macri.

The Court: Well, would he be bound in any way by the type of forms that you were making before he started in?

Mr. Holman: No, I think not, your Honor, but I wanted to show what had been the structures that had been built, I mean what panels had been built for what structures.

The Court: Well, go ahead and show what had been done.

Q. (By Mr. Holman): Tell what had been done by way of building panels for forms, Mr. Staples.

A. Well, we were laying out the panels for 25 structures to take care of the first lateral; in other words, we planned to use 25 complete forms, which according to our plan would take care of the pouring of approximately 15 structures a day.

Q. Now, you had contemplated placing of how much concrete per day?

Mr. Olson: Now, I object to them testifying what their plans were.

Q. Very well, I'll withdraw the question. Mr. Staples, I believe you testified that you had charge of the operations of equipment? A. Yes.

Q. Yes; and I believe you testified that the hoe was used for excavating the structures?

A. Yes.



(Testimony of George Staples.)

Q. Will you explain, please, in detail to the Court how the hoe is operated to dig a structure excavation, both first for a shallow and then for an intermediate and then for a deep structure? How is it used, particularly with respect to its operations in cutting banks or effecting banks?

A. Well, the hoe proceeds down the pipe line until it comes to the structure station. As it approached the structure station the oiler or whoever is marking out for the cut [1904] stakes out the structure one foot outside of the neat lines of the concrete; then the hoe sets up at the most central point of operation to the structure, so that it has not too many moves around there, and proceeds to pull the earth from the far side across the structure and deposit it to either side, where it will be out of the way of form setters or concrete placing, and then——

Q. May I ask you, is the material pulled to the rear and deposited in the rear, or is it deposited on the sides?

A. It is deposited on the sides, away from the structure, so that it won't fall back into the hole, and so that it won't be in anyone's way that has to work around the structure, and in making its bite it reaches far out in front of the machine, because it can't possibly make a vertical cut, and when it pulls the earth toward the machine, it is rarely necessary to move the shovel back in order to get the ground out. In other words, at the far end of the structure and the near end, there is much more

(Testimony of George Staples.)

excavation done than is necessary, because of the size of the hoe and the length of the boom. It isn't possible to manipulate it in a small space.

Q. What sort of boom length did the hoe have?

A. Well, I believe we had a 35—about a 35-foot stick.

Q. That's what I mean by boom, is the stick, is it?

A. Yes. [1905]

Q. Then with respect to the excavation on the sides the same as the ends, and the hoe would the operation there?

A. Well, the structure was staked out at the sides the same as the ends, and the hoe would cut one width of the bucket, on a shallow structure, outside of the stake. The width of the bucket was 26 inches, and where we wanted a slope on it, we'd just knuckle down on the top of the bank with the bucket, which would knock all that earth loose, and it would fall to the bottom, and scoop it out, and have the rough excavating for that structure. In the case of a deep structure—

Q. Just a minute, Mr. Staples. Were the sides of the excavations for the form staked also, were the sides staked, or not?

A. Yes.

Q. Now, was there any offset, or were those right at the line of the side, where the form would go?

A. Well, the offset stakes were—on some of the structures were set back I believe five feet outside of the form. Their policy had been three foot offset, but when we were digging the hoe would reach



(Testimony of George Staples.)

across and would take out the three foot offset stake, so we requested that we have a five foot offset, so that when we were through with the excavation we'd still have a stake.

Q. Now, with reference to the reporter's table here, calling [1906] the end nearest you one of the ends of the structure, and nearest me the other end, and the side he's writing on and the opposite side as the sides of the structure, will you tell me whether or not there were any stakes opposite the sides of the excavation out here, where the reporter is and where the clerk's desk is?

A. Well, there's two sets of stakes. There are stakes all around the structure, which consisted of—rather, which were our marking for the cut, and then there's the Bureau stakes that give the location of the angle point and the structure itself.

Q. Now, in a hoe excavation what is the general condition at the bottom of the hole after it's been excavated?      A. The bottom of the hole?

Q. Yes.

A. There would be in that soil usually about three tenths of loose dirt.

Q. That would be three tenths of what?

A. Three tenths of a foot.

Q. Three tenths of a foot of loose dirt; that would be about how many inches?

A. Well, I would have to look at the scale; 5 inches is 54/100, and that's all I remember on the metric scale.

Q. Something less than 5 inches?

A. Yes. [1907]

(Testimony of George Staples.)

Q. Now, then, what was the fine grading process?

A. Well, the holes were cut about three tenths high, of the highest elevation in the cluster of structures, so that the floor would not be disturbed by the teeth of the shovel. The fine graders in coming along had to take down three tenths, which consisted merely of throwing out the loose dirt of the high level. The other levels had to be cut out by hand, unless they were separated far enough where it was safe to get in and scoop out some with the hoe.

Q. Was there a practical purpose for cutting with the hoe three tenths high; any reason for that?

A. Yes, so as not to disturb the floor level which they had to place concrete against.

Q. Now, after the hole had been dug with the hoe and fine graded, was there anything else to do then, in advance of placing the forms? Was it ready for the forms?

A. When the fine grading is complete it's ready to receive the forms.

Q. There's been some testimony here regarding measurements between you and Mr. Waltie around, or at least in the vicinity of, structure 18 on lateral 59.3. Do you recall that circumstance, Mr. Staples?

A. Well, structure 18, while I'm not sure of that structure number, I believe I know which one it is. It was at the [1908] south side of a road, it was the south side of a road crossing on the first lateral



(Testimony of George Staples.)

or one of its sub-laterals, in which the floor was over-cut by approximately two and a half feet, as I recall, and it necessitated cribbing and back filling and tamping to bring that back to grade.

Q. Now, was that done by you, or under your direction?

A. Yes, the cribbing of the over-cut on that one box was done under my direction.

Q. Was there any work remaning to be done on that one hole after you had completed that work that you've detailed?

A. Yes, there was a little work remained to be done.

Q. Can you tell the Court about how much work there was to be done and what was the nature of that work?

A. Well, the outlet box needed a little work on that, and just a little general trimming and cleaning out would be probably about two or three man hours, would have completed it.

Q. Can you tell me whether or not you and Mr. Waltie checked any holes together, Mr. Staples?

A. Yes, we did.

Q. About when—what time was it?

A. It was before—well, we checked some on April 29.

Q. What did you and Mr. Waltie do?

A. On April 29?

Q. No, when you checked the holes; you say—

A. Well, prior to that, when we made our first excavations, I asked him how he wanted the holes

(Testimony of George Staples.)

cut, and he said, well, just give them some room so they could get in there and set the form; that was new to them and they wanted to become acquainted with the work, and we'd see how that would go; in the meantime I could just continue with the excavation as it had been done, and we would find out what we needed to make it an easier process for them.

Q. Mr. Staples, in the hoe excavations was there any departure from the usual hoe excavation, restricted in any way, hoe excavations for structures—did you depart from that in any way?

Mr. Olson: I object to that question as asking for a conclusion from this witness as to whether he had departed from the usual hoe excavation.

Mr. Holman: I thought he had qualified the other day sufficient for excavation.

The Court: I think he can tell how he excavated the holes, but counsel is basing it upon his departure from what was usually done.

Q. (By Mr. Holman): Maybe counsel anticipated something I don't have in mind. Did you restrict the operation of the hoe as to either cutting toward vertical or otherwise than it is usual?

A. No, it wasn't, the operation wasn't limited; in fact, it [1910] was the other way.

Q. Now, in the measurements which you and Mr. Waltie made, what was determined as to those holes you measured?

A. Well, we had settled on about, I'd say, around four or five or possibly six structures that there



(Testimony of George Staples.)

should be some changes on before they set the forms. The principal correction that was needed was to cut back the banks to give them more room, and I agreed to do that work, and offered to give them two men, when they got into a structure and found they had to do some work, well, I provided one or two men to throw the dirt out for them, so that they would get ahead with their forming.

Q. Did you do that work, Mr. Staples?

A. Yes.

Q. On the holes you checked? A. Yes.

Q. Sir? A. Yes.

Q. You did.

A. I put the men back in with orders for them to do the work that Mr. Waltie wanted done, until we found exactly what type of hole they wanted, and how the operation would best proceed.

Q. Were you present when Mr. W. E. Schaefer was in the field setting up the form panels into a structure? [1911] Q. Mr. Schaefer?

Q. W. E. Schaefer, yes, sir; were you there?

A. Well, he was in the field. He never set up forms.

Q. You didn't see him set up any forms?

A. No.

Q. You did not. All right, sir. Who had charge of the fine grading while you were there, Mr. Staples? A. Sheffield.

Q. What is his name?

A. Curtis Scheffield.

Q. Do you know where he is now? Have you been able to find him? A. No, I do not.

(Testimony of George Staples.)

Q. What did you learn as to his qualifications for fine grading?

Mr. Olson: Now, if the Court please, I object to this witness testifying, obviously he's testifying to what somebody told him.

Q. I don't mean that. Strike the question. Did you know that he was qualified to fine grade?

Mr. Olson: I object to that, if your Honor please. The question is what was done. They may have had the most wonderful fine grader in the world, but if he didn't fine grade these holes, that's what we're up against. This is an attempt to bolster the case up by its shoestrings. [1912]

Mr. Holman: I'm not interested in bolstering. I want to know if this man knew he had a qualified fine grader.

The Court: I'll overrule the objection. It might be corroborative of whether the work was done properly. The question is how it was done.

Witness: Sheffield was on the job at the start and assisted in the location of the laterals for the clearing process, and was over the entire project and became familiar with every type of stake the Bureau used on the project, so that he knew stakes. In fact, part of the project, the last end, when the Concrete Construction Company got in and started to set forms, well, I went up with them and let Sheffield take the balance of the grading, and he was entirely capable of that. Also on the pipe line he had done a little of that work on the job; he knew how to set up a batter and how to take the



(Testimony of George Staples.)

levels and grades off of that, and how to fine grade for the pipe trench, and before I put him on structures I checked over some lay-out plans with him, and apparently he had a good working knowledge of the lay-out plans that he had to follow.

Q. Now, was he the man whom you proffered to Mr. Waltie to use, or not?

A. Yes, he was one of them. [1913]

Q. And another man, or not; how large a crew did you proffer?

A. Well, there would be one or two laborers to go with him, depending on how fast they were setting forms and the amount of work to be done.

Q. Did you satisfy yourself that the forms which had been checked by Mr. Waltie and you had been fine graded properly, Mr. Staples?

Mr. Olson: That question is objected to as being leading and suggestive, and further that it is immaterial whether or not he satisfied himself.

Q. Strike that question; I'll save time, your Honor. State what, if anything, you did toward checking, after fine grading operations, the holes that you and Mr. Waltie had checked before, Mr. Staples?

A. Well, I had gone in and checked several of the holes that we had discussed and measured, after we had made the necessary changes or recommended changes to the fine grading. Others, the forms were set in and I didn't check.

Q. Were you present at a meeting in the field on April 29, 1944, at which were present Mr. M. C.

(Testimony of George Staples.)

Schaefer, Mr. William E. Schaefer, Mr. Waltie, and Mr. Macri?      A. Yes.

Q. I'll ask you whether or not that meeting had been pre-arranged [1914] by anyone with you; did you know of it in advance?

A. I did not know of the scheduled meeting.

Q. Yes, sir; and I believe it's been testified that meeting was April 29, 1944. Did you meet either Mr. Schaefer or Mr. Waltie the day before, do you recall?

A. Yes, the day before Mr. Schaefer came in the office and asked where Mr. Macri was, and I told him I didn't know, and he said well, he had an appointment to meet him, and requested that I contact him, so I called Seattle, and Seattle said that he was on his way to Yakima, and I told Mr. Schaefer, and I believe Mr. Schaefer said "Well, we'll be here tomorrow, then".

Q. Now, did you contact Mr. Macri himself that day, do you recall?

A. I believe if I remember it was the following day that I was able to contact him.

Q. And then where was that meeting on the following day, Mr. Staples?

A. It was in the field.

Q. Tell me just what you remember of that meeting, will you, including conversations, Mr. Staples?

A. Well, I was with the back hoe on lateral 59.5, or in that vicinity, and a truck driver came up and said that they wanted me to come over to



(Testimony of George Staples.)

lateral 59.3, and so I [1915] went over there, and Mr. M. C. Schaefer and Mr. William Schaefer and Mr. Macri and Mr. Fred Waltie were there discussing the holes. I believe we started at the first hole, which covered structures 1, 2, and 3, and they were discussing the amount of space they needed in order to set a form in and to pull the form out, and from that structure we went to the second hole and checked it over, and Mr. Schaefer pointed out what he wanted——

Q. Who did the checking?

A. Well, I believe Waltie and I checked a few of them, but the discussion there was that on the first holes it was an experimental proposition.

Mr. Olson: I would like to have him say what was said, your Honor, and who said it.

Mr. Holman: Yes, the best you can, Mr. Staples.

The Court: Yes, tell what was said and what was done.

A. Well, Mr. M. C. Schaefer said that "we'll concede that the first structure is all right." He said "We'll pass that and go on to the next." In other words, it was tight, and if we would watch that on the others, why, that would be O.K., so there was nothing more said about the first hole, and then to the next hole, and Mr. Schaefer pointed out the banks, and I believe we checked some grades, and I don't recall whether they were at grade or not. As I remember it, those first several holes were off, and they needed some hand trimming to bring them right down to grade. I believe Fred

(Testimony of George Staples.)

Waltie and I checked the grade on one or two holes, probably about three holes, and then Mr. Schaefer said "Well, let's go on down the line." I said well, I knew the condition of those holes, he could take Mr. Macri on down and show them to him, that I was with the back hoe, and I wanted to get back to that, so I left the meeting and went to the back hoe.

Q. Now, do you recall any other conversations in your presence or hearing except what you've detailed to the Court?

A. The discussion while I was there was concerning the banks of the structures, and concerning the grades.

Q. Well, I say, do you recall any others except what you've detailed? A. No.

Q. Did you have any conversation at the job office on that day and after that meeting, with Mr. M. C. Schaefer and Mr. W. E. Schaefer, do you recall? A. I don't recall that I did.

Q. I'll ask you whether or not on that day and at the job office you made any statement to Mr. M. C. Schaefer, Mr. W. E. Schaefer, or in the presence and hearing of either or both of them, to the effect that Mr. Macri had told [1917] you to cut the holes wide enough, and that he told you to get things moving ahead, and then whether you made an additional statement that Mr. Macri told you to do that while Schaefer was there, but when he wasn't there, go ahead and cut them the way they had been? Did you make any such statement?

(Testimony of George Staples.)

A. No, the only thing that could possibly be construed as that would be over the depth of the cut of the hoe. I did misunderstand Mr. Macri, I wasn't able to catch what he said, and he told me to cut those holes three tenths high with the shovel, and that had nothing to do with the fine grading; the fine grading was to go down to grade.

Q. Had you ever had any instructions to do the fine grading three tenths high, or two tenths high, or any other one high? A. No.

Q. What were your instructions with respect to fine grading?

Mr. Olson: Your Honor please——

Q. Very well, I'll withdraw it. Do you recall any conversation with Mr. W. E. Schaefer in the month of March, 1944, did you have any talks with him with respect to the excavations or the fine grading?

A. I believe there were two or three times that we discussed the excavations. [1918]

Q. I'll ask you whether or not as the result of those discussions——

Mr. Olson: Can you have him fix about an approximate time in March that he discussed this?

Mr. Holman: Well, if you'd give me the time that Mr. Schaefer said, that's the time we're talking about.

Mr. Olson: I don't recall his mentioning that at all.

Q. (By Mr. Holman): Do you remember the approximate time in March, or would you remember, that you had a talk with Mr. Schaefer?



(Testimony of George Staples.)

A. No, I don't. He was on the job several times, and early in the game, why, he discussed the excavations every time he came up.

Q. Now, after that time that you were out in the field on April 29, I'll ask you whether or not you had any discussion with Mr. Waltie within a reasonable time after that, a day or two afterwards? A. About that time Waltie and I——

Q. I'm interested after April 29, now; did you have any talk with Waltie?

A. Well, those dates are hard for me to remember, but I believe that within a day or two after April 29, we had agreed on the holes that needed correction.

Q. Now, when you say "we", you mean whom?

A. Waltie and myself; so I laid out my work accordingly, and was figuring on my schedule to keep ahead of them, and at that time they wanted 100 structures, which we agreed to give them, some way, and all I had to do was to get those holes corrected which had been discussed;——

Mr. Olson: Again I would like to have him state what was said, your Honor. He's just stating his conclusions as to what was agreed.

The Court: Yes, you should state what was said.

Q. If you can, state what was said, if you recall. When you say "we," again you mean Waltie and you; you said "we agreed"; is that Waltie and you?

A. Yes, Fred Waltie told me the structures that he wanted graded, so I made my plans to correct

(Testimony of George Staples.)

those structures and keep the shovel moving to go ahead and get ahead, so that we could get 100 structures out of the way and set up a fine grading crew that could go ahead and keep ahead of the carpenters by the requested number of holes.

Mr. Olson: I ask that last be stricken.

The Court: That will be stricken. That was what he planned to do. What did you do? What was said and done?

A. Then the next time I saw Fred Waltie——

Q. Well, just a minute. The Court has ordered stricken what you said. Now, tell the Court what you did. [1920]

The Court: That part of the answer which followed “I planned to do so and so——” will be stricken.

Mr. Holman: I thought he said “we”; “we” means Waltie and him.

The Court: No, he said “I planned to do so and so.”

A. Well, I put some men in to correct the errors, and kept them at that work until a day or two following, whichever it was, the next time I saw Fred Waltie, and then he said that none of the holes was correct; that they'd all have to be corrected.

Q. And had you meanwhile satisfied yourself as to whether or not those corrections had been made?

Mr. Olson: That's objected to, your Honor, as to whether he satisfied himself. Tell what he saw and what he found.

The Court: Yes, what he found.

(Testimony of George Staples.)

Q. When you checked them, what did you find by way of correction?

A. Well, I went back and checked three of the holes that I was reasonably sure were correct, and found that they were, and then just reported what I had found to Mr. Macri.

Q. Now, do you recall having any specific conversation with Mr. W. E. Schaefer in March, or in May, either? [1921]

A. I don't believe I had any conversation with him in May, but I don't recall.

Q. And do you recall any in March?

A. Not specifically, no.

Q. Well, I want you to recall them specifically. Was the offer, your offer, to keep Mr. Sheffield and helpers as fine graders used by Mr. Waltie? Did they use them?

A. They did for a while, and said they were in the way, and didn't want them.

Mr. Olsen: Said what?

(Whereupon, the reporter read the last previous answer.)

Q. Well, about how long was it that they kept Mr. Sheffield and the fine graders, and his crew?

A. Well, I believe several days, but I'm not sure of the time.

Q. I'll ask you whether or not there was any list of men and time expended delivered to you by Mr. Waltie as a claim of work done by the Concrete Construction crew on digging?

A. Well, at one time Fred Waltie came——



(Testimony of George Staples.)

Q. Can you tell me about when?

A. It was around the first week in May, I would say.

Q. All right, what happened then?

A. Fred Waltie came to me with a list that he asked me to sign, and I asked him what it was, and he told me it was for extra work performed by his men on excavations, and I asked him what the purpose of that was, and he said that I was supposed to O.K. it so that he could send it in to the Concrete Construction Company office in Portland for to send to Mr. Macri for collection, and I told him that I didn't know anything about such an arrangement, and if there was such an arrangement to have it in writing so that I'd have authority to keep time on it or O.K. a bill that came in.

Q. Had you any instructions of any kind with respect to approving any such list?

Mr. Olson: That's objected to, your Honor, as asking for a conversation, obviously, between he and Mr. Macri.

The Court: Sustained.

Q. Did you know in advance that there was to be any such list prepared?

A. That was news to me. I had never heard of it before.

Q. Sir?

A. I had never heard that before.

Q. Now, were you present in the field on—the date's been fixed here as June 15, 1944, when Mr.

(Testimony of George Staples.)

Waltie, Mr. M. C. Schaefer, Mr. Macri, and Mr. Al Cohen were present, and it's also been testified that Mr. Allyn Hunter, the bond man, was there; do you remember that meeting? [1923]

A. I was in the field, but I wasn't present at that meeting.

Q. Were you called over to that meeting, Mr. Staples, do you remember? A. No.

Q. Sir? A. No, I was not.

Q. Did you attend that meeting at all?

The Court: He said no, he didn't attend it, he wasn't there.

Q. May I have 49, the book of photographs? I wish to hand you what has been offered into evidence as Exhibit 49. Calling your attention, Mr. Staples, to the photographs numbered 3, 4, and on through 14, as having been taken May 10, 1944, were you advised—will you look at those, please—were you advised in advance whether or not those were to be taken? Did you know anything about them being taken, in advance?

Mr. Olsen: I think it is wholly immaterial, your Honor, whether we told them.

The Court: What is the materiality of whether he was notified in advance of when they were taken?

Q. Well, I want to know—were you present at the taking of them?

A. I was not present when the photographs were taken.

(Testimony of George Staples.)

Q. Now, will you take 49-3, and go on through those various [1924] photographs to 49-14, and indicate to the Court if you can, from those photographs, anything that you recognize by way of tying to your work?

The Court: What is that, Mr. Holman?

(Whereupon, the reporter read the last previous question.)

Mr. Holman: Tying to the work that the witness has done.

The Court: That's entirely too vague. I can't see what is to be elicited by that question; I haven't the slightest idea.

Q. Will you take 49-3, please, Mr. Staples, and tell the Court what, if anything, in that picture you recognize and can point out to the Court pertaining to your excavation?

A. Well, it shows a form in an excavation that I couldn't identify as to station.

Mr. Olson: Now, your Honor, it seems to me that counsel is asking the same kind of a question there that we were not permitted to do. I wanted to have Mr. Darcy testify to what those pictures showed. Counsel said the pictures spoke for themselves as to what they showed. Now, I don't think they should be able to put their foreman on and have him testify to what they show.

The Court: I don't know yet what counsel wishes [1925] to elicit from the question. It is impossible to tell from the question itself.



(Testimony of George Staples.)

Mr. Holman: I wanted, your Honor, to see whether or not any of those pictures which I have indicated, while he was there he can tie to any particular stations.

The Court: Oh, you want to know whether he can identify them to any particular stations? It didn't say anything about stations, as I recall.

Mr. Holman: I should say structures.

The Court: Or structures.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: That's what I had in mind, with respect to those structures, your Honor.

The Court: You had in mind the numbers of the structures; is that what you're trying to tie to?

Mr. Holman: No, your Honor, I had in mind tying to the structure excavations this witness had made, if he knew; if he can't, he can say so.

The Court: You want to know if these photographs are photographs of structures that he excavated, or were excavated under his supervision?

Mr. Holman: Yes, if he recognizes them.

The Court: All right.

Q. (By Mr. Holman): For instance, do you recognize 49-3? [1926]

A. Only by the identification, structure number 6; I know that was my excavation.

Q. You mean that's the typed printing on there, is that what you mean?

A. Yes; the structure itself I couldn't identify.

(Testimony of George Staples.)

Q. Now, will you go right through rapidly with each one, up to 14, and if you find any you can identify, indicate it to the Court?

A. Well, number 5 shows a bank, far from a vertical bank; maybe it is not a one to one, but it is awful close to it.

Mr. Olson: I move that be stricken.

The Court: That's not responsive; it will be stricken. He's asking whether or not you can tell whether these are structures you worked on, from looking at the photographs.

A. I cannot.

The Court: All right, he can't do it, he says. Proceed.

Q. That's all I want to know, your Honor. I think I'm nearly through with this witness, your Honor. Did you have any conversation on June 29 with this Mr. Hunter whom I mentioned, Allyn Hunter?

A. No.

Q. Mr. Staples, what is the fact with respect to the relative [1927] cost of cutting banks vertical with a hoe, for structure excavations, as against cutting them with a slope?

Mr. Olson: That's objected to, your Honor, as being wholly immaterial, what the cost of doing it one way as against the cost of doing it the other way is concerned.

The Court: What is the materiality? What is your purpose, Mr. Holman?

Mr. Holman: My purpose only is to show by this witness which would be the more economical, whether cutting straight down or with a bank.

(Testimony of George Staples.)

The Court: What difference does it make?

Mr. Holman: Well, I'm merely calling him as an expert on it; I don't know, your Honor.

The Court: You don't know why it is material?

Mr. Holman: I think it is material.

The Court: Why?

Mr. Holman: Because it shows the reasonableness of the operation in the usual manner, your Honor.

The Court: Objection sustained.

Mr. Holman: You may inquire.

The Court: The Court will recess for five minutes.

(Short recess.)

(All parties present as before, and the trial was [1928] resumed.)

The Court: Proceed with the cross-examination.

#### Cross-Examination

By Mr. Olson:

Q. Mr. Staples, do I understand that you excavated these holes a foot out from the neat line of the concrete at the foundation of the structure? Do I understand you to so testify?

A. Not at the base line; the excavation I explained was from the surface. Of course it would go down to the base line.

Q. The foot out that you're talking about is at the surface of the ground, from the neat line of the concrete?



(Testimony of George Staples.)

A. That's where the cut is started, yes. That is the hoe operation. It is not a foot out, it is 26 inches, the width of the bucket.

Q. I'm asking you, then, Mr. Staples, did you excavate out one foot from the neat line of the concrete at the foundation or base of the structure?

A. In nearly every case, yes.

Q. In nearly every case?

A. There are exceptions to that, and that was on the first lateral and the first holes, and they were close.

Q. On the first lateral the first holes were close?

A. Yes.

Q. Outside of that you excavated them a foot out at the base of the structure? [1929]

A. Yes.

Q. And did you slope the banks at a one to one slope?

A. The end banks were sloped, had to be, the way the hoe cuts; the side walls, which were vertical at the time the hoe cut them, were knocked down so that they were sloped.

Q. Now, the end banks, are those the ones that are in the ditch itself?

A. Well, it would depend on the way the shovel was facing.

Q. Well, how did the shovel face?

A. Well, in every case it would be different, just depending on where you could set up the shovel and carry on your excavation the easiest.

(Testimony of George Staples.)

Q. Well, then, when you got through, did you have a one to one slope?

Mr. Holman: Object to that, your Honor, as not the test.

The Court: Overruled.

A. After the first lateral none of the structures had vertical walls.

Q. Were they to a one to one slope? I'm speaking of the excavations, and not the structures.

A. They were not precisely to a one to one slope, nor were they vertical.

Q. Now, it is a fact, is it not, Mr. Staples, that while [1930] you were on the job and Mr. Waltie was there, that he continuously complained to you about the holes, the excavations, not being to a one to one slope, and about them being tight?

A. The only complaints he had were in the discussions we had on those first, I believe there were six structures, he had complaints about those.

Q. I'm not asking what complaints he had, but what did he say to you? Did he make complaints to you?

A. That was on those specific holes; it was on being tight.

Q. Well, he complained to you about more than just the first six holes, didn't he?

A. No, not until the last meeting I had, and at that time overnight he changed his mind and decided that every hole was incorrect.

(Testimony of George Staples.)

Q. Yes, and he also complained to you about the sub-grade, didn't he, of each of the excavations?

A. He did on those specific structures, the six that I mentioned.

Q. But not on any of the others? A. No.

Q. Then why was it, Mr. Staples, that you were going to give him your fine grading crew to work under his supervision, if he wasn't saying anything to you about it?

A. Well, that was on those six structures. I had gone in [1931] there when they first started, and Waltie was digging, and I told him that was our job, and if it was necessary, I'd give him several men; it wasn't necessary for him to do the digging.

Q. Well, you said a while ago, Mr. Staples, did you not, that you told Mr. Waltie you would give him Mr. Sheffield and one or two men, and as many more as he needed, to work under his direction in fine grading these holes?

A. That's right, on those six structures.

Q. Was that just to last for the first six structures? A. Pardon?

Q. Was that just to last for six structures?

A. Yes.

Q. When was it you said that to him?

A. Well, that was when he was forming the structures in about the second or third hole. It was right at the start.

Q. Now, Mr. Staples, on your fine grading crew, how many men did you have on the fine grading crew?

A. It varied from two to five men.



(Testimony of George Staples.)

Q. Two to five men, and that was true throughout the time you were there? A. Yes.

Q. Did you have anybody doing work for you classed as laborers, other than the fine graders?

A. Yes.

Q. What would they be doing?

A. Well, it depends upon what time you mean. At various times we had laborers on clearing.

Q. Now, I'll hand you Macri's identification 15, and ask you to take the period of time that you were there, and ask you how this Mr. Sheffield—strike that—as I understand it, Curtis Sheffield was your man in charge of fine grading?

A. Yes.

Q. And does he appear on your payroll there?

A. Yes.

Q. Under what designation?

A. Well, I don't see it here, but by union agreement he was carried as a——

Q. Never mind; my question is——

Mr. Hawkins: Let the witness answer the question.

The Court: Under what designation does he appear on the payroll?

A. Truck driver.

The Court: I think under that it would be improper for him to say what the union rules or agreement was. He can say how he was designated on the payroll.

Q. Is he not designated as such on each one of those weekly payrolls? [1933] A. Yes.

(Testimony of George Staples.)

The Court: What was the designation?

A. Truck driver.

Mr. Holman: I don't follow you, "so designated."

Q. He said he was designated as a truck driver. Now, when did you start your fine grading, Mr. Staples?

A. Probably around the middle of April.

Q. Could you find your payroll for the week that you started your fine grading?

A. Well, I wouldn't be able to pick the starting date, but it is——

Q. Well, there's two of your payrolls missing, are there not, Mr. Staples? In other words, the one for the week ending April 15 is not there, is it?

A. That's right.

Q. Take your——

Mr. Holman: Just a minute, may it please the Court.

Mr. Olson: He said that's right.

Mr. Holman: Well, I don't hear him.

The Court: Perhaps if you speak up a little louder; they don't hear you.

Q. (By Mr. Olson): Take the week ending May 3, April 27 to May 3. Can you find that one?

A. Yes. [1934]

Q. All right; now, how many fine graders do you have on the payroll that week? A. One.

Q. And who is he? A. Sheffield.

Q. All right; and how many hours?

A. 40 hours.

(Testimony of George Staples.)

Q. 40 hours, and he's designated as a truck driver? A. Yes.

Q. All right; now take your next week, May 4 to May 10; how many fine graders did you have on that week? A. Seven.

Q. Seven; all right, now, were those seven on all during the week, or do you mean seven different men throughout the week?

A. Well, some of them, three of them, started their week the last day of that pay period.

Q. And how many other men did you have on that last day of the week, fine grading?

A. Seven were on that last day.

Q. May I see that, Mr. Staples? Now, what day is that, Wednesday? Now, who are the fine graders, the seven you had on?

A. Brown, Fowler, Wiley, Sells, Amick and Hernandez.

Q. Amick doesn't appear on the payroll, does he, that day? [1935]

A. No; neither does Hernandez.

Q. Neither does Hernandez? A. No.

Q. So you didn't have that many on that day, did you, Mr. Staples?

A. There were five on that day.

Q. Now, on Monday, how many did you have on? Mr. Holman: Give the week, will you?

Q. That's the week ending May 10; pardon me—I don't mean Monday; the first day you show on that you show on a Tuesday, don't you?

A. Yes.



(Testimony of George Staples.)

Q. How many fine graders did you have on that day?      A. Three—four.

Q. And who are they?      A. Sheffield—

Q. That's designated truck driver?

A. Yes. Hernandez—

Q. Hernandez designated labor; that's two.

A. And Sells.

Q. Sells on for five hours, designated laborer?

A. That's right.

Q. All right, now the next day?

A. The next day, Sheffield, Hernandez, Amick; that's all.

Q. All right; now take your next week. How many fine [1936] graders did you have on the next week, May 11 to May 17?      A. Four.

Q. That's including Mr. Sheffield?

A. Yes.

Q. Now, that's all the laborers you show on the payroll that week, is it not?      A. Yes.

Q. So you're saying that they were all doing hand grading?

A. That's what they're on the payroll as.

Q. They're on the payroll as laborers, are they not, Mr. Staples?      A. Yes.

Q. In other words, for the week ending May 17 your payroll shows three laborers, does it not?

A. Yes.

Q. And it doesn't show that they each worked every day during the week, does it?      A. No.

(Testimony of George Staples.)

Q. Matter of fact, the three of them together only worked 80 hours the whole week, which is two men working 40 hours a week, isn't that so?

A. Between the laborers, but Sheffield was on in addition.

Q. Yes, Sheffield, who was designated a truck driver. Now, do you know whether or not those laborers were doing anything else other than hand grading that week? [1937]

A. Principally that's all they did.

Q. Now, your next week how many did you have on, May 18 to May 24, how many laborers do you show on your payroll? Three, is it not?

A. The labor classification is three.

Q. Three; all right, and they didn't work every day, did they? A. No.

Q. But the three of them total 60 hours for that week? A. Right.

Q. All right, now the next week how many, May 25 to May 31, how many laborers do you show on there that week? I'm excluding Mr. Sheffield. How many laborers do you show on there? There's only one, isn't there, Mr. Staples?

A. There's one laborer.

Q. Yes, and how many hours did he work that week? A. Twenty-four.

Q. All right. Now, your week of June 1 to June 7, how many laborers do you show on that week? Again there's one, isn't there, Mr. Staples?

A. There's no laborers on this.

(Testimony of George Staples.)

Q. Ending June 7? A. Oh, May 30——

Q. I'm asking for the week ending—well, pardon me, did I skip one? [1938]

A. Well, there's a man on there for doing structure work, outside of Sheffield.

Q. Now, what week are you talking about?

A. June 7.

Q. All right, June 7 you show one man beside Sheffield? A. Yes, for fine grading.

The Court: When you say the week of June 7 do you mean the week ending June 7?

Q. Yes. How many hours did he work?

A. The laborer, or the fine grader?

Q. Was the laborer doing fine grading?

A. No; there's a fine grader on here, has been for a couple of weeks, but he's not classified as a laborer.

Q. What is he classified as? A. Lay-out.

Q. I thought you said your lay-out man was the one who staked the holes for the shovel?

A. No.

Q. Well, then, who is your lay-out man there?

A. Leonard LeMaster.

Q. And what did he do?

A. He helped Sheffield lay out the structures for fine grading, the finish work.

Q. Well, was he in charge of the fine grading, or was Sheffield in charge of it? [1939]

A. Sheffield was in charge.

Q. But this other man did the laying out?

A. Under Sheffield.



(Testimony of George Staples.)

Q. All right. Now, in the week ending June 14, how many do you show working on your fine grading crew then, and under what designation?

A. Sheffield, LeMaster——

Q. That's two, Sheffield is shown as truck driver.

A. LeMaster, lay-out, Fowler, laborer; that's three.

Q. That again takes in all the laborers shown on that week, does it not?          A. Yes.

Q. Pardon me, before I leave this, on June 14 how many hours did your laborer work that week?

A. Eight hours.

Q. Eight hours; that's one day, isn't it?

A. Yes.

Q. All right; now, your lay-out man, how many hours did he work that week?          A. Sixteen.

Q. That's two days. Now, Sheffield, how many hours did he work that week?          A. Forty.

Q. Forty. All right, on the week ending June 21, how many fine graders did you have on that week? [1940]          A. Four.

Q. Four, and under what designation are they shown on your payroll?

A. There are three laborers and Sheffield.

Q. Now, your lay-out man is gone now, is he?

A. Yes.

Q. So there's Mr. Sheffield and three laborers?

A. That's right.

Q. And that again takes in all the laborers that you show on the payroll for that week?

A. That's right.

(Testimony of George Staples.)

Q. Now, weren't your laborers doing anything else at all besides fine grading?

A. Whenever there was need for the fine graders to do the fine grading, that work came first.

Mr. Olson: I ask that be stricken, your Honor, as not being responsive.

The Court: I'll deny that. I think it is responsive, generally.

Q. Well, did they do anything else?

A. Yes.

Q. And what all work did your laborers do?

A. At infrequent periods they would assist in scattering pipe.

Q. Assist in scattering pipe?

A. Yes. [1941]

Q. Anything else?

A. I believe that's all.

Q. Had Mr. Macri sub-contracted the excavations for the pipe?

Mr. Holman: Objected to as outside of the issues, your Honor, and not proper cross-examination.

The Court: Overruled.

A. No.

Q. He did that work himself?

A. Up until that time, yes.

Q. So at the time that we've gone into these payrolls, Mr. Macri was himself doing the pipe trench excavation?

A. The pipe trench excavations all the way through the job.

(Testimony of George Staples.)

Q. Pardon?

A. The pipe excavations, trench excavations, were not subbed.

Q. Now, it was your suggestion, then, to Mr. Waltie, Mr. Staples, that Mr. Waltie take this Mr. Sheffield and possibly some additional help, and that he show them how to do this fine grading?

A. No.

Q. Well, what did you tell Mr. Waltie, then?

A. I told him that where work to be done, it was our part of the contract to do that work.

Q. Yes.

A. And I would leave one or two men, or whatever was necessary, in order to do that work for him so he wouldn't [1942] have to do it.

Q. Well, who was going to tell them what to do and how to do it, Mr. Staples?

A. Well, at the beginning of the job Waltie was to show them how they wanted the banks cut back, what they needed for room, the principal reason for that being that at the start of the job they preferred a vertical wall, because they can place more effectively and with less labor——

Mr. Olson: I ask that be stricken as not responsive.

Mr. Holman: I submit it is, your Honor.

The Court: I'll grant the motion. It doesn't appear who "they" are, or who told him that. That is very vague.



(Testimony of George Staples.)

Q. (By Mr. Olson): My question is, Mr. Staples, I'll ask it again, who was going to tell Sheffield and the other men that you were going to leave with Mr. Waltie how to do the fine grading?

A. They were over there so that if a wall needed to be taken back more to suit Fred Waltie's idea, these men would take it out. They weren't there to learn how to take it out, or how to read grades.

Q. They were taking instructions from Mr. Waltie, then?

A. They were to take out the dirt at his direction.

Q. They were to take instructions from Mr. Waltie, is that [1943] so, or were they to take instructions from you?

A. Well, the truth of the matter is that there was some more dirt to come out there.

Q. Mr. Staples, just answer my questions. You turned these men over to Mr. Waltie. Now, I'm asking you who were they to take instructions from, Mr. Waltie, or yourself?

A. From Mr. Waltie.

Q. All right; and at that time that was the entire crew of fine graders that you had, was it not?

A. No, I don't think it was the entire crew.

Q. On April 28, Mr. Staples, you say Mr. Schaefer came in and said he wanted to see Mr. Macri?

A. Yes.

Q. And you said you didn't know where he was?

A. I believe so.

Q. Now, isn't it a fact that Mr. Schaefer then told you and complained to you about these exca-

(Testimony of George Staples.)

vations in detail, that they were not to a one to one slope, that the sub-grades or sub-elevations were wrong, and that they were not excavated out to the proper lateral clearance; didn't Mr. Schaefer say that to you?      A. He could have.

Q. Well, he did?

A. At several times he did, but I couldn't name the place or the time. [1944]

Q. Did you ever see Mr. Schaefer, I'm speaking of Matt Schaefer, when he didn't complain to you about the excavations?

A. Well, there was about three occasions that I talked to him about the job, and on those three occasions I believe he brought it up.

Q. Well, he brought it up rather emphatically, did he not, Mr. Staples?

A. Well, I knew what he was saying.

Q. Yes, and on this April 28 he then told you that if you didn't get Macri on the job so that he could see him and get this job fixed up, he was going to pull his men off and go home, on April 28 didn't he say that to you?

A. Well, he could have. All I recall is that he asked me to get Mr. Macri. I remember that distinctly.

Q. Yes, and you said you didn't know where to get him?      A. I believe so.

Q. And so Mr. Schaefer said if you didn't get hold of him then and get these excavations on the button, that he was going to pull out and go home with his crew?      A. Well, I don't recall that.

(Testimony of George Staples.)

Q. And didn't you then get hold of Mr. Macri in Yakima?

A. I believe it was the following day.

Q. Didn't you get hold of Mr. Macri that day, right here in Yakima? [1945]

A. Well, I made the calls right in front of Mr. Schaefer, while he was there, and whether I got him that day or the next day, I don't remember. I kept calling until I could get hold of him.

Q. But you got hold of him that same day, right in Yakima? A. I don't remember that.

Mr. Hawkins: I wonder if Mr. Olson will make that clear; do you mean Mr. Macri was in Yakima?

Q. Yes, Macri in Yakima, Staples in Sunnyside.

A. I called Mr. Macri's office in Seattle.

Q. Do you have a record of that long distance call? A. I don't.

Q. Isn't it a fact also that after you got hold of Mr. Macri you told Schaefer you knew where Macri was all the time, but that he had told you not to bother him? A. I don't recall that.

Q. Pardon? A. No.

Q. You don't remember telling Mr. Schaefer that? A. No, I do not.

Q. Well, Mr. Macri had told you that, hadn't he? A. He did not.

Q. Now, I didn't get the time it was that you were up with Mr. Schaefer checking the excavations, with Mr. Matt Schaefer. [1946]

A. The time I was checking with him?

(Testimony of George Staples.)

Q. Yes, or was it Bill Schaefer that you were out checking the excavations with?

A. I only remember checking with Fred Waltie, and actually measuring the holes.

Q. Well, you testified, Mr. Staples, about Mr. Schaefer pointing out the banks and about checking the grades; now, you don't recall that at all?

A. Well, yes, he pointed out the banks, but we didn't actually measure the structures.

Q. What Schaefer was that, Bill or Matt?

A. Well, it was both of them, at different times.

Q. All right, and they both of them pointed out to you about the banks not being sloped?

A. Yes.

Q. And also you said you checked some grades and they needed some change on the grade, is that so?

A. That I checked by myself.

Q. I'm just asking you what you said, Mr. Staples. I didn't quite follow you on it.

A. I said that I checked some grades.

Q. With Mr. Schaefer?

A. No.

Q. You didn't check any grades with either one of the Schaeferes? [1947]

A. I don't think I did.

Q. Now, you didn't mean to say that you discussed excavations with Mr. Bill Schaefer in March, did you, of 1944?

A. I think so.

Q. Well, you hadn't started yet, had you?

A. Well, I hadn't discussed structures with him until after they were on the job, and some excavations had already been made.



(Testimony of George Staples.)

Q. Well, you didn't start your structure excavations until April, did you?

A. That's right, it would be in April.

Q. Yes. Now, you also said that you checked three holes after Mr. Waltie had talked to you, as I understand it, you went back and checked three holes and found them correct. Do you remember the three holes that you were talking about, or do you remember the testimony I'm referring to?

A. Yes.

Q. Well, what three holes did you check?

A. Well, I don't know which ones they were; they were on the first lateral, and ones that I just happened to be near.

Q. Now, you say you found them to be correct. What do you mean by that?

A. Well, they were according to plans and specifications.

Q. Were the banks sloped to a one to one?

A. No.

Q. They were vertical, or nearly so, were they not?

A. Well, they weren't vertical.

Q. I say, they were approximately so, were they not?

A. Well, I don't recall about that, but they were not a straight cut, I know that.

Q. And they weren't out a foot from the neat line of the concrete structure, were they, at the base of the excavation?

A. Yes, they were.

(Testimony of George Staples.)

Q. Did you check that?

A. I measured them for grade and for width and length.

Q. Were the forms in there then? A. No.

Q. Do you know when you did that?

A. It was right after Fred Waltie said that none of the holes were correct.

Q. Do you know when that was?

A. No, I don't.

Q. And how many excavations were ready at that time, or had been excavated?

A. All of the first lateral, and possibly half of the second lateral.

Q. And you checked three?

A. On the first lateral. [1949]

Q. Is that structures, or excavations?

A. Excavations.

Q. You didn't check any more of them?

A. No.

Q. Now, you also said, Mr. Staples, that Mr. Waltie said that he didn't want these fine graders or men that you were offering him, and that after a few days he said that they were in the way. Do you remember when that conversation took place?

A. No, I don't, but they had probably five or six holes for them by that time.

Q. My question is, do you know when it was?

A. No.

Q. All right; now, just what did Mr. Waltie say?

A. I don't believe there was any more of a conversation than that.

(Testimony of George Staples.)

Q. Well, did you say anything to him?

A. No, all I said was that the men were available if it was necessary for them to do any work on those first holes, and that we'd cut those holes in a way to keep ahead of them, and would try to get him 100 structures ahead, and keep out of his way.

Q. And why in the world didn't you do it, Mr. Staples?

Mr. Holman: I object to that question; I think it is improper cross-examination. [1950]

Mr. Olson: He keeps coming back and saying he's going to do it.

The Court: It is argumentative. I don't think there is any testimony that they did get 100 structures ahead.

Mr. Olson: No, I didn't ask about it, but he keeps saying it all the time.

Q. (By Mr. Olson): Isn't it a fact Mr. Waltie told you these men didn't know how to fine grade, didn't know how to read a hub, and they didn't know how to find an elevation, and for that reason they were in his way? A. No.

Q. They didn't know how, did they?

A. Sheffield knew how; the laborers are not supposed to know how.

Q. Oh, the laborers are not supposed to know how. Now, did Mr. Sheffield ever drive a truck on your job? A. Yes.

Q. He did that most of the time, didn't he?

A. No.

Mr. Olson: That's all.

(Testimony of George Staples.)

Redirect Examination

By Mr. Holman:

Q. Why was Mr. Sheffield noted as a trucker on the payroll, Mr. Staples?

A. Well, it was necessary because of his union card. [1951]

Q. Will you explain that?

A. Well, he was by agreement with the union, we could use him on various classifications, and carry him on the truck driver's card, and the truck driver's basis.

Q. Was that the reason—pardon, are you through?

A. That's the only reason he was carried that way.

Q. Counsel at the opening of his questions with you about these meetings used the name Darcy. I am sure that was a mistake, that he meant Waltie.

You had no talks with Darcy? A. No.

Mr. Olson: If I said Darcy I didn't mean that.

Q. You had no talks with Darcy at all, did you?

A. No.

Q. Darcy was not on the job while you were there?

A. He may have been there at the last part, but I think he came later.

Q. Did you have any conversation with Darcy about the holes? A. No.

Mr. Holman: That's all.



(Testimony of George Staples.)

The Court: Do you have any examination?

Mr. Hawkins: I wanted to ask the question that your Honor sustained an objection to, as to the relative cost in making a vertical excavation as against making an excavation on the one to one slope. I asked the witness [1952] what his answer would be to that question, when he stepped down at the recess, and he told me that his answer would be that there would be very little difference in cost. I would like to get that testimony in. I think it is material, for this reason, that it tends to support the testimony that he gave that no request was made on his part by Waltie——

The Court: If that's the answer to be given, it would be corroborative, to a certain extent. You may ask it, then.

### Cross-Examination

By Mr. Hawkins:

Q. Mr. Staples, what is the relative cost in excavating for one of these structures, as to whether the walls are vertical or whether they have a one to one slope?

A. Well, the cost—there is very little difference, inasmuch as the front wall and the end wall, that face the back hoe, cannot be cut vertical, and therefore in order to secure the one to one slope, all that's necessary is to cut the proper width at the side and knuckle down the bank and clean out the bottom.

(Testimony of George Staples.)

The operation wouldn't consume probably more than just two or three minutes of the shovel's time.

Mr. Hawkins: That's all.

Mr. Holman: I would like to ask—I thought counsel had a question or so to ask. [1953]

Mr. Olson: You finish first.

### Redirect Examination

By Mr. Holman:

Q. Mr. Staples, do you recall the size of the Concrete Construction Company crew during the period that counsel asked you, from the week of May 3, 1944, through June 21, 1944?

A. Yes. They had approximately—they had two men in the yard building panels, and they had I believe three men in the field.

Q. Now, then, that would be throughout that period, if you recall that?

A. That was what they had most of the time. There was one or two occasions they brought in more men for field assembly.

Q. Do you recall whether or not between the date of May 24 and June 28 Mr. Waltie was present or absent from the job?

A. I believe he was in Portland during that period.

Q. Do you recall whether or not from the week of May 31 until Mr. Waltie returned there was anybody in charge?

A. None except their men in the yard.

(Testimony of George Staples.)

Q. And who were those men, if you recall?

A. Klugg and Monrad, and possibly Mercelle.

Q. Were those the only men there at that time?

A. I believe so.

Mr. Holman: Your Honor, at this time the defendants [1954] wish to introduce from Macri's 16 the portion of the Concrete Construction Company payroll for the period from the week of April 27—let's see, the week ending May 3, 1944, to and including the week ending June 21, 1944, as illustrative of this witness's testimony. I will have copies made to substitute, your Honor.

Mr. Olson: Your Honor, it doesn't illustrate this witness's testimony at all. He's testified how many men we had on the job. We have testified at great length that during that period we pulled our men off, except two men. I don't see that the payroll will substantiate anything. The testimony is that the reason we pulled them off was that there was no structure excavations to work on. There is no controversy on that.

The Court: I can't see where his testimony makes the documents admissible.

Mr. Holman: Well, the documents themselves, your Honor, are documents submitted by the Concrete Construction Company to the Bureau of Reclamation, and it is their own showing under oath of the payroll they had there at that time, the same period that counsel's interrogating this witness.

(Testimony of George Staples.)

The Court: He's interrogated him about the number of men you had on, and you've brought out from him the number that the Concrete Construction Company had, [1955] haven't you? That's your testimony?

Mr. Holman: Yes, that's right.

The Court: I can't see where it makes the payroll admissible, the mere fact that he has testified that was the number they had on, and it happens to be the same number shown on this document. It may be otherwise admissible, I don't know.

Mr. Holman: A declaration against interest, your Honor, as far as the Concrete Construction Company is concerned, with respect to the cross-examination of this witness; that's the purpose of it.

The Court: Well, if it is properly identified it might be admissible as an admission against interest. I don't think it would be, simply because the witness has referred to it.

Mr. Holman: No, that's correct.

The Court: I'll sustain the objection. If you want to offer the whole thing later, we'll consider whether it is admissible.

#### Recross-Examination

By Mr. Olson:

Q. Mr. Staples, you say that this Mr. Curtis Sheffield had a truck driver's union card?

A. Yes.



(Testimony of George Staples.)

Q. And that was your man that you had in charge of your fine grading? [1956] A. Yes.

Q. Now, the time that you just testified about the Concrete Construction Company having two men on the payroll, during the latter part of May and the first part of June—is that the period you refer to? A. That's the approximate period.

Q. Now, that's the time, is it not, Mr. Staples, when the Concrete Construction Company pulled its field crew off the job because there was no structure excavations ready to work on?

Mr. Holman: I object to that as calling for a conclusion of the witness.

The Court: He can answer if he knows. Overruled.

A. That's what they said.

Mr. Olson: That's all.

Mr. Holman: That's all, Mr. Staples.

(Whereupon, there being no further questions, the witness was excused.)

### ARTHUR ANDERSON

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Will you please state your name and your place of residence, and your present occupation?

A. My name is Arthur Anderson, reside at Sunnyside, Washington; general contractor. [1957]

(Testimony of Arthur Anderson.)

Mr. Olson: I didn't get your first name.

Q. Arthur Anderson. Mr. Anderson, will you state what experience you have had in connection with the Roza Project?

A. I first went to work on the Roza in 1939, and been on it since, until last year.

Q. Now, during that time you had what jobs and what was your capacity on them?

A. Well, the first two years I was carpenter foreman on two wasteway jobs. After that I was superintendent on three different—four different jobs.

Q. Are you familiar with the job known as specification 1062, schedule 1?

A. That's what you call Macri's job?

Q. Macri's job, yes.           A. Yes.

Q. Will you tell me whether or not you had any jobs in that close vicinity? What jobs did you have?

A. Well, I had a job just like that just west of Macri's. At that time I was working for Murphy-Campbell. We had a job just like that.

Q. And who had been your various employers on your jobs out there?           A. What's that?

Q. Who have been your various employers?

A. Well, Murphy-Campbell Company, L. Coluccio, Bernard & Curtis Company, Dave Richardson, Adler Construction Company.

Q. What was your capacity in these various jobs? What were you doing?

A. Well, the last four of them I was general superintendent.

(Testimony of Arthur Anderson.)

Q. Yes, sir. Now, in the course of those operations did you have occasion to use a hoe in excavation? A. Yes.

Q. Tell me whether or not the hoe is the usual and economic manner of excavation for a structure?

A. Yes, small structures, yes.

Q. And when you say small structures, does that refer to structures of the type on the Macri job?

A. Yes.

Q. How much occasion did you have to become familiar with the operations on the Macri job, yourself?

A. Oh, I went over it three or four times every day for about six or seven months.

Q. And during what months were those?

A. Well, from the first of February until, oh, September or October, that year, 1944.

Q. And during that time did you have occasion to observe the type of excavation for structures being done? A. Yes. [1959]

Q. And from your experience were you able to tell whether or not they were excavated adequately for the accommodation of forms?

Mr. Olson: Now, if the Court please, I think that the witness should first describe what kind of an excavation he is referring to.

Q. Very well. Will you describe the type of excavation that you saw on the Macri job during that period, Mr. Anderson?

A. Oh, I saw all these structures; I saw the holes excavated for structures along the roads. Of

(Testimony of Arthur Anderson.)

course I didn't go over the whole job. There was a hoe used there digging those holes, some men fine grading in that; just the usual procedure on a job like that.

Q. And were they with respect to type—what type of structures—what was their equipment, do you remember?

A. Well, the most I saw was road crossings.

Q. Road crossings; and what type of equipment was used on those, do you remember?

A. Hoe.

Q. The hoe. Will you explain to the Court how a hoe is used in the operation for excavating structures, as you saw it operated on that job?

A. Well, you bring the hoe up to where the hole is supposed to be dug, and start dipping out the dirt.

Q. And what is the actual operation? How does it work? [1960]

A. Well, it's kind of hard to explain, if you don't know what a hoe looks like.

Q. Well, explain what a hoe looks like, then.

A. All right; a hoe is a shovel with a hoe attachment on it. It is a boom about 25 or 30 feet along. It reaches out, scrapes the dirt toward you.

Q. And what with respect to the side banks of an excavation, what happens to those in that operation?

A. Well, in the far end and the end next to the machine, naturally will be sloped down in quite a slope, and each side of them will be practically straight up and down.



(Testimony of Arthur Anderson.)

Q. Now, can you tell me generally as to the type of structures that were on this Macri job, as to whether they was pretty small structures, or large structures?

A. Oh, they are all small structures.

Q. And by that you mean what?

A. On those road crossings it would be, well, say, seven foot by five, that's length and width, and the depth varies anywhere from four feet to seven feet, approximately.

Q. Now, in a deep structure, let's say a seven foot structure, what is the operation of the boom of the hoe there? Can it cut vertical, or must it cut on a slope?

A. Oh, a deep structure like that they will cave in by themselves, the sides will cave in; you can't dig straight up and down. [1961]

Q. And is a vertical bank with a hoe a practical operation?

A. Yes.

Q. Sir?

A. I didn't—

Q. I say, is a vertical bank, cutting an absolutely vertical bank with a hoe, an practical operation?

A. Well, you can't cut them straight up and down.

Q. You can't cut them straight up and down. Your Honor, shall I go on? It's noon.

The Court: No, we'll take a recess now. I have another matter to take up at 1:30, so this case will be resumed at 1:40, twenty minutes to two.

(Whereupon, the Court took a recess in this cause until 1:40 o'clock p.m.)

(Testimony of Arthur Anderson.)

Yakima, Washington, Monday, March 17, 1947

1:40 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Anderson, can you tell me the approximate number of structures on the Richardson job you had in 1943?

A. Well, I can't tell you on Richardson job, because I was just finishing that job up.

Q. Can you tell me on Murphy-Campbell?

A. Murphy-Campbell had around 500. [1962]

Q. And the Collucio job, was that a large or small job? A. That was a small job.

Q. From your inspection of the Maceri job, in travelling back and forth, were you able to determine relatively how the small structures or the box structures would compare with the road or deep structures, road crossing or deep structures? It's been testified here about 536 structures, Mr. Anderson.

A. Out of about that many structures, they should have about 50 or 60 deep structures.

Q. 50 or 60 deep; that would leave, then, somewhere around 475 or so of the shallow or box structures. Now, what would be the reasonable depth, the usual depth, of a box structure, the small structure?

(Testimony of Arthur Anderson.)

Mr. Olson: Well, if your Honor please——

Q. Well, on this job.

Mr. Olson: If he wants to testify as to what he saw——

Q. Were you able to determine from your inspection on this job, Mr. Anderson, whether or not the small structures or the box structures carried depth comparable with the other small structures in the field on the Roza Project? A. Yes.

Q. Did they, or did they not?

A. They did. [1963]

Q. Then will you tell the Court approximately what would be the maximum depth for the box structure? A. Three foot.

Q. Now, that would be what, three foot of excavation, or wall, or what?

A. Well, it would be three foot of excavation.

Q. And what would be the maximum depth that an operator putting the forms together would have to reach down to fasten the fastenings of the forms together? A. Two foot six.

Mr. Olson: I think that's asking for a conclusion, your Honor, of this witness.

The Court: Overruled.

Q. Two foot what? A. Two foot six.

Q. While we're on that, Mr. Anderson, I want to hand you plaintiff's Exhibit 44, and will ask you if that exhibit has a name, in practice, what it is?

A. Well, that's a tie rod; what you call a cone type tie rod.

(Testimony of Arthur Anderson.)

Q. Do they call that a she-bolt, or not?

A. No.

Q. Will you tell the Court what a she-bolt is?

A. A she-bolt is a bolt that's hollow on both ends, screwed into this bolt in the middle, and also on the outside you got a big nut to tighten up; no cone in here whatsoever. [1964]

Q. There is no cone in a she-bolt?

A. No.

Q. And as to relative distance required for the accommodation of a union such as 44, as against a she-bolt, would a she-bolt require more or less over-all distance?

A. A she-bolt would require more over-all distance than this.

Q. Then what would be the maximum amount that a she-bolt would have to be untightened to remove with the panel?

A. Six inches.

Q. How far would it have to be untightened?

A. Six inches.

Q. And with reference to 44, this one that I handed you, what is the reasonable distance needed to untighten that for the purpose of removing a panel?

A. Oh, thickness of shiplap, an inch, an inch and a half.

Q. How's that?

A. About an inch or inch and a half.

Q. Now, that would require a distance, then, back, of an inch or an inch and a half removal, is that it?



(Testimony of Arthur Anderson.)

A. Well, you would have to pull this bolt out toward the bank an inch and a half to get it loose, yes.

Q. Then can it be removed with the panel or not, when it is separated?

A. You mean this type? [1965]

Q. Yes. A. Yes.

Q. And the she-bolt, can it be removed with the panel? A. No.

Q. How are structures staked out, Mr. Anderson? A. How are they staked out?

Q. Yes, sir.

A. Well, the Bureau of Reclamation puts a blue top on each side of the head wall.

Q. Blue top is a new term here; what is a blue top? What's it for?

A. Well, a blue top is a stake that you drive in the ground, to determine the grade, and painted blue. The Reclamation paints the top of it blue. That's the reason you call it blue top. That's the main stake to go by. Behind this you have different cut stakes, that will give you the cut of the structure, the depth you have to go.

Q. Now, does the government field force or the operator's put in the cut stakes?

A. Government.

Q. Then what other staking, if any, is there preliminary to excavation?

A. There's no other stakes.

Q. Then what is the operation with respect to excavating a hole after those stakes have been put

(Testimony of Arthur Anderson.)

in; what you told [1966] the Court this morning, or not?      A. How's that?

Q. Is it the kind of an operation you told the Court here this morning?      A. Yes.

Q. In excavating for a structure, Mr. Anderson, what is the practical depth with respect to the grade of the structure, that the hoe should excavate?

A. Well, you should stay about two tenths above sub-grade.

Q. That's two tenths of what?

A. Two tenths of a foot.

Q. Why?

A. Well, because the Bureau of Reclamation will not let you loosen the ground under the structure. You have to dig that out by hand.

Q. Then what is the next process called?

A. Well, after it's what we call rough graded or dug out with the equipment, we send laborers, fine graders, to fine grade the balance.

Q. I will ask you this, Mr. Anderson: Assuming that there had been no fine grading on the 400-odd box structures that you have estimated as to quantity, approximately how much man-hour work would be required to fine grade those structures?

A. Well, on our job it averaged, two men would fine grade [1967] ten structures a day.

Mr. Olson: I move that be stricken on the ground it is not responsive to the question.

Mr. Holman: I join.

The Court: Yes, it will be stricken.

(Testimony of Arthur Anderson.)

Direct Examination

(Continued)

By Mr. Holman:

Q. You mentioned on your job. We want to know what is an average man-hour requirement to fine grade those structures.

A. One man should fine grade five structures.

Q. Sir?

A. One man should fine grade five structures a day.

Q. And what would be the approximate cost of that?

Mr. Olson: That's objected to as being immaterial.

The Court: Overruled.

Q. What should that cost, in the field?

A. A day's wages, you figure \$1.30 an hour, 8 hours would be \$9.70 a day, \$9.70 for five structures.

Q. Now, you spoke of there being probably 40 to 50, I think you said, of the deep structures, or road crossing structures. What would be the operation of fine grading in that?

A. Well, it would be the same as the rest of the structures; you do all your rough grading with machinery, so your fine grading would be approximately the same.

Q. And if there are different elevations or different grades [1968] for the water, would that be done with the machine also, those different gradings, a structure with two or three different water levels?

A. Well, of course most of that is done by hand.

(Testimony of Arthur Anderson.)

Q. Most of that is done by hand?

A. With very little variation.

Q. Well, what would be the reasonable cost of fine grading a so-called deep structure, a road crossing structure?

A. I'd say \$2.00 a structure for the actual fine grading.

Q. Now, what is the practical and usual method of setting panels for forms? How's it done? Will you tell the Court?

A. How you set the forms?

Q. Yes; I'm interested particularly with respect to the distance that is required out in the excavation; how is the form set? Just tell the Court, will you?

A. Well, the way we done it is we dug the hole a foot——

Q. The Court will not allow you to tell how you did it, but will you tell me what is the practical way?

A. Well, the practical way is to dig the hole a foot bigger than the structures, build your forms in panels, haul them out, and set them up in the hole, the carpenters set them up in the hole.

Q. Well, how are they set up there?

A. Well, they are all built in panels; two men on each [1969] structure, picks up the structure, sets it in the structure, ties it with the sway brace, the inside panel is assembled and set right down in the middle, and then of course you put your whalers



(Testimony of Arthur Anderson.)

and she-bolts in, tie the form together, brace it against the bank all the way around.

A. There's been reference to strong-backs. Are those the same as whalers? A. Yes, the same.

Q. Now, do the whalers or strong-backs have to be permanently fastened to the panels, or not?

A. No, I didn't.

Q. Sir? A. I never fastened them.

Q. Well, as a practical requirement do they have to be fastened, or not? A. I don't think so.

Q. And after the concrete is poured or is placed in the structure and has cured, then what is the method of disassembling or breaking up the forms?

A. Well, you loosen your she-bolts, take your whalers out, pull your braces, pull up the form.

Q. Now, can that be done from the inside, or must it be done from the outside?

A. Well, of course you have to work on the inside and outside [1970] both.

Q. And what distance with respect to the small box structure does a man need outside to loosen the tie? A. About a foot.

Q. About a foot; and in the deep structures, such as the crossing structures, what does he need?

A. Oh, you need a little more room on a deep structure; I'd say probably two feet down along the side. You would have to have a little more room.

Q. Does he need any more distance at the base, at the floor? A. No.

Q. And on the sides you say he need a little more room?

(Testimony of Arthur Anderson.)

A. On the sides; of course, on a deep structure, your sides will naturally cave in anyhow; you can't dig them straight up and down.

Q. Sir?

A. You haven't got a straight up and down on the wall.

Q. Does the hoe excavation on each structure supply a sufficient width on the bank for the purpose of removing the forms? I say, does a normal hoe excavation on a deep structure supply a sufficient bank for removing forms?

A. Normally dug, yes.

Q. If it is dug one foot out from the base would that be true? [1971]

A. Yes.

Q. Mr. Anderson, in erecting forms—would you step here a minute, please? With reference to Exhibit 23 in the model, can you tell me whether or not you have seen any excavation in the field upon that slope of one to one?

A. No.

Q. Now, with reference to Exhibit 25, and calling your attention to the walls 25-b and 25-a, tell me whether or not the concrete is poured directly against those walls?

A. It is poured directly against the walls.

Q. Now, with reference to the raised portion on this model 25, can you tell me what that normally represents with respect to an excavation for a deep structure?

A. That will be the dirt that's been excavated from the structure.

(Testimony of Arthur Anderson.)

Q. I'll ask you whether or not it would be possible for the shovel to excavate a structure, to excavate the walls that I'm pointing to, 25-b, entirely vertical?      A. No.

Q. And would it be possible in a shovel operation to have the material deposited at the close proximity to that wall as indicated on this model?

A. It is possible, but not likely.

Q. Is it practical to place a deposit there?

A. No. [1972]

Q. With reference to the portion of this model marked 25-d and 25-c, what are those, Mr. Anderson?      A. That's what we call cut-off wall.

Q. And how are those made?

A. Made by hand.

Q. And with reference to 25-e, you see this little slope in here, and 25-f——

A. Also made by hand.

Q. Now, in fine grading, are those part of the normal operations, or not?      A. Yes.

Q. And is there a manner of protecting those after they are fine graded, or are they left open?

A. They're left open.

Q. And how much of a performance is entailed in excavating 25-c and 25-d?

Mr. Olson: Object to that question, your Honor, as being meaningless.

Q. How much labor——

The Court: Just a moment; your objection, Mr. Olson?

(Testimony of Arthur Anderson.)

Mr. Olson: Well, he's qualified it some way now by saying how much labor. I still object to the question. I don't know how you would measure it, how much labor.

Mr. Holman: Well, he can tell me man hours.

The Court: Well, I'll overrule the objection. He [1973] may answer it, if he can.

Q. I think he can.

A. Oh, an average of—one man should dig a cut-off wall in two hours.

Q. Two hours?           A. In hard digging.

Q. In hard digging, yes, sir; and how much man hour labor would be involved in straightening the wall 25-a or the wall 25-b; that would be hand labor, would it?           A. Yes.

Q. Approximately how much time would that take?

Mr. Olson: How in the world can a man answer a question like that, unless he knows what he's got to start with, when the man takes the shovel.

Mr. Holman: Well, assuming that the excavation has been made with the hoe, now what would be the labor required in man hours for bringing those two walls vertical?

Mr. Olson: I make the same objection, your Honor. It is manifestly impossible for any man to answer that question.

The Court: Overruled.

A. Oh, I'd say—this particular structure was quite deep—three hours.



(Testimony of Arthur Anderson.)

Q. And how much time in your opinion in man hours would be [1974] required to fine grade 25-k, the base here? A. Oh, about an hour.

Q. One hour; and how much man hours would be required to fine grade 25-h, 25-j, 25-i, and 25-e and 25-f?

A. Oh, four hours; that's for two men.

Q. Two men, four hours, that would be sixteen man hours, then?

A. No, that would be eight man hours.

Q. Eight man hours—oh, four hours, two men, yes. Then what in your opinion is the maximum time reasonably required to make all of these fine grading operations that I have indicated, including the digging of 25-d and 25-c?

A. That's a three structure job, isn't it? Oh, twenty man hours.

Q. Twenty man hours. Take your seat again, Mr. Anderson. Mr. Anderson, is it economical and practical to remove the panels from one structure after the concrete has been cured and the form removed, onto another excavation for immediate use? A. No.

Q. What has to be done before it can be again used?

A. It's got to be hauled into the shop and overhauled, fixed up, greased, hauled back out.

Q. Now, did you say greased? [1975]

A. Yes; oiled.

Q. And is that true as a continuing operation, or not; is that always required? A. Yes.

(Testimony of Arthur Anderson.)

Q. Is there an advantage or disadvantage in having a uniform type of panel for structures, that can be accommodated by it?

A. Well, it is an advantage.

Q. Sir?

A. You're better off if you can use the same panel, sure.

Q. And what is the normal life of a panel? I'm not speaking now of the lining, of the plywood, but the normal life of a panel itself is about how much in practice; how many times should it be used?

A. I have used them up to 35 times. Of course the average would be about 20.

Q. About 20 times, sir; and with respect to the plywood lining next to the concrete, I don't know whether you've seen these panels or not, that are here; have you seen those, Mr. Anderson? With respect to those, how frequently can they normally be considered as available for use?

A. Well, of course, I never used plywood, I used Masonite all the time. You can use that several times more than you can plywood.

Q. Is there the same wear and the same deterioration to [1976] either Masonite or plywood as there is to the lumber in the panels?

A. No, there is more wear on plywood or Masonite.

Q. Yes, sir. What, in your opinion, would be a reasonable maximum quantity of lumber required for performance of the structure excavations—for

(Testimony of Arthur Anderson.)

building the forms for the concrete structures on this job, 1062, schedule 1? Do you have a figure or can you give me the basis from which you determine a figure, Mr. Anderson?

A. Well, on our job we used between——

The Court: Just a moment; it seems to me that is objectionable unless counsel wants to let it go in.

Q. I'll ask you this: In other words, you can't tell about your job, Mr. Anderson. I'm asking about this job; assuming that there are 536 structures, concrete structures, placed, and assuming that approximately 50 of them are the deep structures of the type you have been interrogated about, with respect to plaintiff's Exhibit 25, and that the remaining structures are the box type structures, the shallower structures, what would be the basis for determining the maximum reasonable amount of lumber required; how would you go about it?

A. Well, you would have to figure out how many forms you were going to build, figure out how much lumber it takes to each form, and add them all up, and see how much lumber [1977] you need.

Q. Tell me whether or not you would have to consider the number of times they would be used?

A. Well, of course, yes.

Q. And would there be a percentage of breakage or destruction that you would figure in there, or not?

A. Yes.

Q. About how would that run, how high a percentage of that?

A. Oh, I say 10 per cent.

(Testimony of Arthur Anderson.)

Q. 10 per cent for breakage or destruction, sir. Now, assuming that there were 536 structures of the types you have indicated here to the Court in which concrete had been placed on this job 1062, schedule 1, what would be your estimate of the maximum reasonable amount of lumber required, or can you tell me? I don't want just mere speculation, but if you can give me an estimate, I want it.

A. Seventy thousand feet.

Q. Did you observe the lumber being supplied for the Macri job while it was in progress, while in forms were being built in the job yard; were you at the job yard? A. I seen it, yes.

Q. What was the type of that lumber as compared with the general types of lumber at that time?

Mr. Olson: That's objected to, your Honor, as being [1978] immaterial and irrelevant, compared with lumber somebody else may have been using.

Mr. Holman: Well, I don't see why it is; there isn't any provision in the sub-contract that there should be any specific grade of lumber furnished.

The Court: Well, you asked about type of lumber, didn't you?

Mr. Olson: He asked about how it compared with the other jobs.

Mr. Holman: Generally on the other jobs.

The Court: I think he should state directly what kind of lumber he saw there. We don't know anything about the specifications on the other jobs, or what the arrangements were.



(Testimony of Arthur Anderson.)

Mr. Holman: Very well; I had in mind that compliance with the usual practice would be adequate.

Q. (By Mr. Holman): Mr. Anderson, will you tell the Court from your own inspection of the lumber in the yard at the times you saw it, and the times you saw it in the field, if you did see it in the field, whether or not that was adequate form lumber? A. Yes, it was.

Q. Yes; and did you observe the operations of the Concrete Construction Company with respect to building forms, installing forms—pardon me, with respect to building [1979] panels, installing forms, pouring the concrete, curing the concrete, and removal of the panels; did you see all those operations by the Concrete Construction Company or not, sir?

A. Yes, I saw, not all of it, but I saw lots of it, yes.

Q. Well, can you tell the Court whether or not in the operations of the Concrete Construction Company with respect to placing concrete they had adequate or inadequate equipment, in your opinion?

A. Well, they had——

Mr. Olson: If your Honor please, I think this man should be asked to state what equipment we had, and then what was the matter with it.

The Court: I think it is objectionable, what this witness regards as adequate or inadequate. That would mean very little to the Court.

(Testimony of Arthur Anderson.)

Q. Very well; will you state what equipment they had for placing the concrete, if you recall?

A. Well, they had a big mixer on the job——

The Court: Had what?

A. A big concrete mixer, Buggymobile, several trucks, plenty of equipment.

Q. Now, will you tell me whether or not that was the type of equipment adaptable to the job in question?

A. It was, in my opinion it was too expensive equipment for [1980] the type of work, too heavy equipment.

Q. Will you explain that to the Court, Mr. Anderson, why you say that?

A. Well, it's equipment equal to a million dollar job, that you could use on a big job.

Q. And with respect to capacity, what about it?

A. Had plenty of capacity.

Q. Now, did you observe the actual operations of the men of the Concrete Construction Company in placing the concrete in the structures, did you observe that?

A. Repeat; I didn't get that.

Q. Did you see the men placing concrete in the structures, the Concrete Construction Company men; did you see that?

A. Yes.

Q. Will you tell me whether or not that was done in a skillful or an unskillful manner?

Mr. Olson: Same objection, your Honor. Let the witness testify to what we did.

Q. Well, tell what they did.

(Testimony of Arthur Anderson.)

A. Well, they had plenty of men around when they poured concrete; in fact, more men than I ever had on the job.

Q. In your opinion were there more men on that work than was required, for the work being performed?

A. Of course, it took more men with the equipment that he had; it took more men to run the equipment he had than it [1981] took what I had.

Mr. Olson: Well, I ask that that answer be stricken as not responsive.

The Court: It will be stricken.

Q. (By Mr. Holman): Mr. Anderson, I'm asking you as an expert, and what you had yourself is just not a test, but I'm asking you whether or not there was an over-plus of men around the operation of placing this concrete.

Mr. Olson: That question is certainly leading, your Honor, and suggestive.

The Court: Yes, it is very leading. Sustained.

Q. Well, what was the fact?

A. There was too many men around the job.

Q. And did you observe the removal of the forms by the concrete people?

A. Oh, sometimes, yes.

Q. Can you tell me whether or not from your experience their method of removal was the usual method, or not?

Mr. Olson: Same objection, if your Honor please.

(Testimony of Arthur Anderson.)

The Court: I'll sustain the objection to that.

Q. Can you tell me what they had to do with respect to stripping forms? Did you observe that, Mr. Anderson, or not?

A. Well, I won't say I observed that.

Q. All right, sir. Now, with respect to specification 1068, [1982] did you observe the operation on that, Mr. Anderson, or not? A. No.

Mr. Holman: You may inquire.

### Cross-Examination

By Mr. Olson:

Q. Did you say that you were superintendent for somebody else down there, Mr. Anderson?

A. Yes.

Q. And who?

A. Murphy-Campbell Company.

Q. And were you working for Murphy-Campbell as his superintendent at the times that you've described all this work on 1062? A. Yes.

Q. Well, now, how many times were you on job 1062?

A. Well, I had to go across that job every day, two or three times a day.

Q. And when you went across it, you went on what? A. What is that?

Q. You traveled the main county road, didn't you? A. I had to, to go over.

Q. You went up and down the main county road, didn't you? A. Yes.



(Testimony of Arthur Anderson.)

Q. These laterals run along the main county road?  
A. Quite a few of them are. [1983]

Q. The laterals and the disperse boxes and the delivery boxes?  
A. Yes.

Q. Isn't it a fact that all you could see were these road structures?

A. Not necessarily; there's other structures besides a road crossing.

Q. How many structures did you actually examine, if any?

A. I can't say I actually examined any.

Q. Matter of fact, you didn't examine any of them, did you?

A. It was none of my business; I saw them.

Q. It wasn't your business and you didn't examine a single structure, did you?

A. I seen a lot of them; I can't say I stopped and examined them, no.

Q. Isn't it a fact that the only thing you saw on 1062 is what a person would normally see driving along the road in their car?  
A. Yes.

Q. That's a fact, isn't it? I want to be sure about it.

A. Well, of course, I was interested in the job more than just any ordinary man that drove across it, because I might learn something, being I done the same kind of work.

Q. Yes, but the only things you saw, though, was when you were going from one part of your job, to and from work, or [1984] some place else, you

(Testimony of Arthur Anderson.)

went down the road in your car; how fast did you drive?

A. Well, at that time you couldn't drive very fast.

Q. How fast did you drive?

A. Ten miles an hour.

Q. Was the road pretty bad? A. Yes.

Q. Did it keep your attention on the road, to see where you were going?

A. I paid more attention to see what the other fellow was doing.

Q. How about the dust; was there any dust there? A. Oh, some.

Q. Did that obstruct your view any, of these structures? A. Not bad.

Q. Did you ever go out and look at any structures to see the fine grading that was done in them?

A. Oh, yes, I have.

Q. That one right along the road? A. No.

Q. What structure did you look at?

A. I don't remember just what structure, but I seen a lot of them.

Q. I'm asking you what structure you got out and examined, if any. [1985]

A. I couldn't answer you that, because I don't remember which one I stopped and looked at.

Q. How close was it to the road?

A. Probably all depends on what road. There was a thousand roads going up and down the sage brush, that we took.

(Testimony of Arthur Anderson.)

Q. When was it?

A. Oh, it was in the middle of the summer, in 1944.

Q. Middle of the summer? A. Yes.

Q. How many structures did the excavation have in it? A. How's that?

Q. How many different structure excavations was it? Was it a single structure, or two, or three?

A. Oh two, three, four.

Q. Well, was it two, or three, or four?

A. I seen lots of them. I just didn't stop at just that one; I seen several of them.

Q. Just name me one day, approximately, and what structure you looked at.

A. I couldn't do that.

Q. Well, as a matter of fact, Mr. Anderson, you didn't examine any of them, did you?

A. Well, that all depends on what you call examine. I did stop and see them, see if I could learn anything about their methods, or if my method was the best. [1986]

Q. Did they have forms in them? A. Yes.

Q. The ones you saw already had forms in them?

A. Well, both; I seen them with and without forms, seen them poured, seen them stripped.

Q. Did you ever see an excavation that had been fine graded and didn't have a structure in it?

A. Well, not to my recollection.

Q. Not to your recollection. Now, you say that a hoe cannot excavate a vertical bank, or did you say that? A. That's what I said, yes.

(Testimony of Arthur Anderson.)

Q. Now, if a hoe comes up to a location to excavate, won't the sides of that excavation be vertical if the ground will stand?

A. Not exactly, because the hoe, the bucket of the hoe, will swing as you pull it towards you, and hit the walls, or hits a rock, or something, and it will cave down so you will have a little slope on the high structures.

Q. Well, the shovel will lift straight up and down, won't it?

A. No, it will drag toward you.

Q. Well, how do they get it up out of the ground?

A. They drag toward you, and picks it up; it drags it toward you, you have quite a flat slope.

Q. Well, Mr. Anderson, that shovel when it comes up on the machine side of the excavation, it will come right straight [1987] up in the air?

A. That's all right, but you can't put your machine right at the edge of the structure.

Q. It can lift it straight up?

A. Yes, when the hoe is pulled up as far as it comes, but you're not digging in that position.

Q. No, but when you get your shovel full, and this type of shovel you were using, you can lift it straight out of the hole, can't you, full of dirt?

A. No; no.

Q. Can't do it?           A. No, you can't.

Q. Now, when you were down and looked at this Exhibit 23, you noticed several different sub-grades, did you not?           A. Yes.



(Testimony of Arthur Anderson.)

Q. How many did you notice?

A. Oh, there was four; three or four.

Q. I wonder if you would step down there just a minute. Now, if you were going to excavate the excavation, exhibit 25, with a hoe, what is the deepest excavation you would make, at 25-i, 25-h, 25-k, or j, or what?

A. The deepest?

Q. Yes. A. 25-k.

Q. You would excavate 25-k with a shovel?

A. Yes.

Q. And how wide would you do it with reference to the bank, 25-b?

A. Well, that all depends on the size of that particular structure. What size box was it?

Q. Well, assuming that this is an excavation which is six feet six inches deep.

A. Six foot six inches deep, and how wide? How big is the box?

Q. Well, my question is, Mr. Anderson, take your wall, 25-b, could you excavate that wall with a shovel?

A. No.

Q. And how close to it could you come?

A. Approximately six inches.

Q. Approximately six inches?

A. Depends a lot on the material of the ground.

Q. Well, can you answer that question without knowing the ground?

A. Six inches, on this kind of ground.

Q. And would you excavate the 25-i at a different level than 25-h and 25-j, with your shovel?

A. No, I don't think I would; in this case I would use them all the same level.

(Testimony of Arthur Anderson.)

Q. All the same level; and then your fine graders would have to come in, would they not? [1989]

A. Yes.

Q. And the length of time it took them to excavate or hand grade or fine grade one of these excavations would depend entirely upon how rough the hoe excavated it, wouldn't it? A. Yes.

Q. And when you estimated twenty hours, I think you said, for fine grading, did I understand you to say it would take approximately twenty man hours to fine grade a hole of this type? A. Yes.

Q. What type of a rough excavation were you assuming in your twenty hour figure, Mr. Anderson?

A. Well, I assumed that you excavated to within two tenth of sub-grade.

Q. All around the structure?

A. All around the structure; of course, this one you will have more, this 25-h.

Q. Now, you wouldn't say that you could fine grade that structure, then, exhibit 25, in twenty hours, would you? A. Yes.

Q. Well, you can't, can you, Mr. Anderson, excavate that within two tenths of grade, with a shovel? A. All but 25-h.

Q. Are you assuming that 25-i and 25-j are the same elevation? [1990] A. Practically.

Q. You're assuming that they are, practically; how much difference do you think there is between them? A. Well, as a rule——

Q. No, how much difference in sub-elevation did you figure on this structure in answering counsel twenty hours? A. Four inches.

(Testimony of Arthur Anderson.)

Q. Figured four inches; and how much difference in elevation did you figure between 25-h and 25-i, in giving your twenty hours? A. A foot.

Q. A foot; and how much cutting did you figure on bank 25-b, in inches or feet? A. Six inches.

Q. Six inches, all the way down? A. Yes.

Q. Pardon? A. Yes.

Q. So you figured a vertical wall which had to be excavated laterally six inches? A. Yes.

Q. And what did you figure about the rough excavation being in proper alignment?

A. I don't quite understand what you mean.

Q. Well, did you figure that the rough excavation was in [1991] the place where it was supposed to be? A. Yes, of course.

Q. And if any of those things weren't the fact, that would materially change you estimate of time?

A. Yes.

Q. All right; you can go back to the stand. Now, I want to know again, Mr. Anderson, if you ever got out of your car and went out over specifications 1062? A. Yes, I did.

Q. And you did that how many times?

A. Oh, quite often; I couldn't say just how many times.

Q. And you did that while you were superintendent and running the entire work of the Campbell crew? A. Oh, I had foremen.

Q. Pardon? A. Yes, I did.

Q. You said yes what?

A. I did stop when I was working on that job.

(Testimony of Arthur Anderson.)

Q. How did you see the banks of these excavations that you examined, were they vertical, or sloped, or how were they?

A. Well, I say they were quite straight up and down. They were sloped some, of course, yes.

Q. You say they were quite straight up and down?      A. Yes.

Q. Now, if after the shovel finished the excavation roughly, [1992] if the bottom portion of the excavation was dug out by hand, that would take away much of the slope that was left in the excavation by the shovel, wouldn't it?

A. If the bottom was dug too deep?

Q. No. If the lateral at the bottom of the excavation, if it was widened out at the bottom of the excavation after the shovel finished it, that would make the walls then practically vertical, wouldn't it?

A. I don't quite understand what you mean.

Q. Now, you say that a man should be able to fine grade five structures per day?      A. Yes.

Q. What type of a structure do you have in mind, what type that a man should excavate five of a day?

A. Well, I had in mind an average structure, weirs.

Q. Well, how deep and how wide?

A. Four by four.

Q. A square?

A. Four by four; square, yes.



(Testimony of Arthur Anderson.)

Q. Just a square four by four excavation?

A. That's the average structure.

Q. And one elevation; did you ever go over the lay-out plans on 1062?      A. No, I did not.

Q. Well, you don't know, do you, all the different types of [1993] structures that they had on 1062?      A. No, I don't.

Q. So you wouldn't tell this Court that one man should be able to hand grade or fine grade five of those structures a day?

A. Taking it for granted that their job was like ours.

Q. Pardon?

A. I took that for granted, that their job was the same as ours, practically the same.

Q. So what you were referring to in your answer, you were referring to five structures of the type that you had on your job, and you were taking a structure that was four feet by four feet, with all one grade; just an ordinary square hole?

A. Yes.

Q. After looking at this exhibit 25 again, did you say that was a three structure hole?

A. No, that's a four structure, if I remember right.

Q. As a matter of fact, it is only two, isn't it?

A. Yes, it is two.

Q. Pardon?      A. Two.

Q. What did you mean when you said four?

A. Well, there's so many different types. I was thinking of a weir and other outlets. It's pretty

(Testimony of Arthur Anderson.)

hard to keep track [1994] of all those different types of structures they have.

Q. Well, it is just two, isn't it? A. Yes.

Q. And you still think that that could be excavated, those two structures, in twenty hours?

A. That should be excavated in twenty hours, yes.

Q. Let's see, that's two structures in twenty hours; that would be ten hours to one structure, wouldn't it?

A. Yes, but that's the hardest type of structure that you've got on the job there.

Q. You say this is the hardest type?

A. That's right.

Q. As a matter of fact, this is a typical structure out there on 1062, isn't it?

A. No; outside of these road crossings, this is one of the deepest structures you've got out there.

Q. Did you ever see any fine graders at work on 1062?

A. Oh, I suppose I did, yes. I really didn't pay much attention to them.

Q. Well, you saw the hoe working, didn't you?

A. Yes.

Q. You saw that? A. Yes.

Q. Now, the next thing would be the fine graders?

A. That's right. [1995]

Q. Now, did you or didn't you see them working? A. I saw them working.

Q. You saw them working too; how many times?

A. I wouldn't say how many times, because I can't.

(Testimony of Arthur Anderson.)

Q. Who was with you?

A. Who was with me? Oh, most of the time I had to drive alone.

Q. Who did you talk to, if anybody?

A. Oh, I talked to quite a few of the guys, lots of the fellows, I don't remember; talked to Darcy several times.

Q. When did you talk to Mr. Darcy?

A. Practically every day.

Q. Practically every day?

A. That is, when he was there.

Q. Now, you say you also saw the Concrete Construction Company putting in the forms?

A. Yes.

Q. And you saw them pouring concrete?

A. Yes.

Q. You saw them taking the forms out?

A. Yes.

Q. Now, how much room did you say they should have, how much lateral clearance, in one of these excavations?

A. That they have on their job?

Q. No, how much should you have? [1996]

A. A foot.

Q. A foot from what?

A. A foot at the bottom of the structure, at the base of the structure, you should have a foot clear.

Q. Well, from what?

A. From the concrete; from the outside wall.

(Testimony of Arthur Anderson.)

Q. From the outside wall at the foot of the structure, and how much from there on up, how about the bank?

A. Well, of course, you might have—I like to have it just as tight as possible.

Mr. Olson: I move that be stricken, your Honor, as not being responsive. I'm asking how much you should have.

The Court: Well, it will be stricken.

Mr. Holman: I submit it is his opinion.

The Court: Well, I think the question is what should be required or should properly be there, not what he likes.

Witness: Well, I'd say at the top a foot and a half.

Q. How thick a panel do you put on this concrete?      A. What's that?

Q. How thick is your outside panel?

A. Well, let's see, two by four, and ship lap, that would be four and three quarter inches, four and a half.

Q. And did you have to use a whaler on them too? [1997]      A. Yes.

Q. And what thickness is that?

A. Two by four.

Q. And how much thicker will that be?

A. It would be eight and a half inches.

Q. Now, I believe you said you didn't tie your forms together with any bolt or tie rods?

A. We tied them together with she-bolts.

Q. Pardon?      A. We used she-bolts.



(Testimony of Arthur Anderson.)

Q. And how much more space does that require?

A. About six inches.

Q. And that requires, then, an over-all space of how much?

A. About a foot.

Q. Now, when you take your she-bolt out of your form, can you take it out in six inches?

A. Yes.

Q. And then how do you get your outside panels off?

A. Just pick them right up, straight up.

Q. Just pick them right straight up?

A. Yes.

Q. How about the panels after they were taken out; I believe you said it was ordinary practice to take them back to the yard each time and fix them?

A. Yes. [1998]

Q. What would you be fixing about them?

A. Well, they've got to be cleaned, scraped, and got to be oiled, and once in a while a board will be cracked, and they'll replace a board.

Q. Did you have to re-oil them after each time they've been used?

A. Yes.

Q. And what was the purpose of the oiling?

A. So that a form would slip from the concrete; so they don't stick to the concrete.

Q. Well, then, why did you have to scrape them?

A. Well, some would stick to them. Before you oil them you scrape them so your oil would take effect.

Q. What is the practical difficulty of doing that in the field?

(Testimony of Arthur Anderson.)

A. You're out in the field, the sage-brush; you haven't got no level place to lay them down; you can't clean them.

Q. Why?

A. Because you haven't got no place to work on them.

Q. You mean you haven't got room enough?

A. There's too much sage-brush out there.

Q. You mean to say you couldn't re-oil those forms out in the field?

A. Probably could, yes, if you wanted to.

Q. There would be no difficulty about it all, would there? [1999] Would it cost you a lot more money?

A. Yes, it would.

Q. What is the difficulty about it?

A. Well, you've got sage-brush and all kinds of stuff laying around. You got no place to work, like you should.

Q. What have you got laying around?

A. Well, you're got a pile of dirt, you've got sage-brush three foot high; that's about all. That's enough.

Q. Couldn't you lay those panels on your truck bed and oil them?

A. I couldn't afford to have the truck sewed up that way.

Q. Pardon?

A. I couldn't afford to have truck tied up that way.

Q. How long would it take to oil them?

A. Structure like that, quite a few forms; I'd say a couple of hours.

(Testimony of Arthur Anderson.)

Q. And how long to clean them?

A. Well, that's oiling and cleaning combined.

Q. How long would it take you to haul them back to the yard and out to the next structure, assuming you have an average haul about nine miles?

A. Well, I would say about an hour, hour and a half.

Q. And another hour and a half to get them back?

A. No, about three quarters of an hour to haul them in, and [2000] three quarters of an hour to haul them back.

Q. I'm sorry, I didn't understand you; three or four what?

A. Forty five minutes hauling them in, and forty five minutes hauling them back.

Q. Well, now, do you know the average depth of the structures on 1062, from your own knowledge?

A. No.

Q. And when you gave your testimony on that, you again were basing that on the job that you worked on?

A. That's right.

Q. And isn't that true, Mr. Anderson, of most of the descriptive testimony which you gave as to dimensions, that it was based on the excavations and structures that you worked on on your other jobs?

A. That's right.

Q. And you don't know how many deep structures there were on 1062?

A. No.

(Testimony of Arthur Anderson.)

Q. You again were basing that on the Murphy-Campbell job that you worked on?

A. That's right.

Q. And the cost that it would take to excavate a structure by hand grading would depend entirely, would it not, on the type of rough excavation that was done? [2001]

A. Yes.

Q. And your figures are based on the rough excavation being approximately two tenths of the final grade that is required by the lay-out plans?

A. That's right.

Q. And if there were not such rough excavations done, why, then your figures would not be approximations on this job?

A. No, of course not.

Q. Now, you say you saw some of the lumber that was used on this job?

A. Yes.

Q. Do you know when you saw the lumber?

A. Oh, I'd say during the summer; I would say in June, something like that.

Q. Where did you see it, Mr. Anderson?

A. I saw some of it already made up in forms, and I saw some at their shop.

Q. How many times were you at the yard?

A. Well, I came by there quite often, quite regular, three or four times a week.

Q. And you say the lumber was all right. Showing you plaintiff's Exhibit 29, Mr. Anderson, you may examine it if you wish, would you say that that was proper or adequate form lumber, as the term is used?

A. It is all I could get at that time.



(Testimony of Arthur Anderson.)

Q. And your answer is that that is adequate?

A. That's all I could get. It's not adequate, but that's the best we could get at the time.

Mr. Olson: I ask that both those answers be stricken, your Honor, as to what he could get.

The Court: I don't believe they're directly responsive. They will be stricken.

Q. I'm asking you, Mr. Anderson, is this the type of lumber that you saw? A. Yes.

Q. Both in the yard and the Macri office?

A. I would think so, yes.

Q. And this is Exhibit 29, and that's the type of lumber that you refer to that you saw there? Is your answer yes? A. Yes.

Mr. Hawkins: I would like to have the record show that the witness inspected the boards on the outside of that bundle, that he was not shown the boards on the inside of the bundle, the bundle was not opened for his examination.

The Court: Yes, the record may show that.

Mr. Olson: Well, let's cut it open and let him look at them all, then. Will you step down and examine these, if it is necessary to, Mr. Anderson, or can you tell without taking them apart? [2003]

Mr. Holman: I object to——

The Court: That isn't necessary, to lay them all out that way. Have you made your examination?

Witness: Yes.

The Court: The record may show now that he has looked at each board.

(Testimony of Arthur Anderson.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Now, you say that you also examined the Concrete Construction Company's equipment on the job? A. Yes.

Q. And you thought that their equipment was too good for that job, is that what you meant to say? A. That's right.

Q. It was entirely adequate, was it not?

A. Well, I couldn't use that equipment.

Q. Pardon?

A. I couldn't use that kind of equipment on that kind of a job.

Q. What was the matter with it?

A. Well, it is too big.

Q. What was too big?

A. The mixers, the mixer especially cost too much money to move it up from structure to structure.

(Whereupon, photograph of transit mixer was marked plaintiff's Exhibit No. 90 for identification.) [2004]

Q. I'll show you plaintiff's identification 90, and I will ask you if you recognize that piece of equipment? A. Yes.

Q. And on whose job was it?

A. Murphy-Campbell.

Q. And this is a transit mixer, mobile, is it?

A. That's right.

(Testimony of Arthur Anderson.)

Q. Do you remember this occasion?

A. Yes.

Q. It shows your machine badly——

A. Stuck in the mud.

Q. ——stuck in the terrain out there, doesn't it?

A. Yes.

Mr. Olson: We offer plaintiff's identification 90 in evidence.

Mr. Holman: No objection, your Honor.

The Court: Admitted.

(Whereupon, plaintiff's exhibit No. 90 for identification was admitted in evidence.)

Q. (By Mr. Olson): Now, that wasn't any mud there, was it, Mr. Anderson? A. How's that?

Q. You said something about "stuck in the mud"; that wasn't mud, was it?

A. Yes, it was. [2005]

Q. It was mud? A. Yes.

Q. What part of the year was this?

A. It was in summer time.

Q. In the summer time? A. That's right.

Q. And you say that was mud? A. Yes.

Q. Well, how do you explain that?

A. Well, sir, they turned the water on in the main canal and coming down the pipe line; they turned it in before the job was completed. The head gate at the main canal leaked, coming down the pipe line, and naturally it got soft there, and the truck driver didn't see it, and backed right into the thing. That happened once in the years.

(Testimony of Arthur Anderson.)

Q. Pardon?

A. That happened once during the time of construction.

Q. That's a Bureau of Reclamation picture, is it not?

A. That's right; I got one just like it.

Mr. Holman: I'm sorry, I didn't get that last.

Q. (By Mr. Olson): He said he had one just like it. Now, you say we had more men than what we needed?

A. Oh, I didn't say you had more men than you needed; you had more men than I had on my job, for pouring. [2006]

Q. Oh, then, you didn't intend to indicate to this Court that the Concrete Construction Company had more men on the job than they needed? A. No.

Q. Pardon? A. No.

Mr. Olson: That's all.

### Cross-Examination

By Mr. Hawkins:

Q. Mr. Anderson, was that a transit mixer shown in that last picture, exhibit 90, is that right?

A. Yes.

Q. If you have transit mixers on the job you do not need as many men, is that right?

A. That's right.

Q. And if you have one of these big Mixomobiles you need more men? A. That's right.



(Testimony of Arthur Anderson.)

Q. So it was the having of this Mixomobile that required more men to be on the job?

A. That's right.

Q. That would make it a more costly operation?

A. I think so, yes.

Mr. Hawkins: That's all.

Mr. Ivy: No question. [2007]

Redirect Examination

By Mr. Holman:

Q. Mr. Anderson, you told counsel that you talked with Darcy several times, and talked to him practically every day when he was there. Was Mr. Darcy absent from the job, to your knowledge, was Darcy away from the job, or not?

A. No, I saw Darcy on his job.

Q. I was wondering what you meant by saying when he was there. Do you mean just when he happened to be there?

Mr. Olson: That's certainly getting into the leading field. The witness has answered his question, and now he's suggesting something else.

The Court: Have you a question? Go ahead with your examination. I assumed he meant during the time Mr. Darcy was working on 1062.

Q. That's what I was trying to find out.

The Court: I mean during the time he was employed there. He wasn't there throughout the whole construction.

Q. Is that what you meant, Mr. Anderson?

A. Yes, that's what I meant.

(Testimony of Arthur Anderson.)

The Court: Am I right about that?

A. Yes.

Q. Mr. Anderson, can you tell me from your experience whether there is a general uniformity of box structures [2008] and road structures and similar structures on the different jobs in the Roza Project?

A. Well, as far as I know they're most of them pretty much the same.

Q. And is that true with respect to 1062, schedule 1, compared with the other jobs? A. Yes.

Q. And in answering me on direct examination did you have that in mind, sir?

A. What's that?

Q. And in answering me on direct examination did you have that in mind, the uniformity?

A. Yes.

Mr. Holman: That's all.

Mr. Hawkins: I neglected to ask Mr. Anderson about these boards down here; that wasn't followed up. I wonder if the clerk would mark these boards here?

(Whereupon, three of the boards in Exhibit 29 were marked 29-a, 29-b, 29-c.)

#### Recross-Examination

By Mr. Hawkins:

Q. Mr. Anderson, with respect to exhibits 29-a, b and c, which were the boards inside the bundle that you first examined——

(Testimony of Arthur Anderson.)

Mr. Olson: I object to that, your Honor. It is not a true statement. Those are not the boards that were [2009] on the inside of the bundle.

Mr. Hawkins: Would you state that they were all on the outside, counsel?

Mr. Olson: I won't state they all were, but I'll state that 29-b was on the outside of the bundle.

Q. (By Mr. Hawkins): With reference to boards 29a, b and c, that's these three right here, counsel states 29-b was on the outside, I take it he concedes a and c were on the inside, is that right?

Mr. Olson: No, I don't concede it. I don't remember it. I remember board b was on the outside.

Q. (By Mr. Hawkins): In any event, with respect to a, b, and c, is that typical of the lumber that you saw out on the Macri job?

A. It's poorer than I saw there.

Q. It is poorer than you saw?

A. Yes.

Mr. Hawkins: That's all.

Redirect Examination

By Mr. Holman:

Q. Did you see any used lumber out there? Was Macri supplying used lumber, or was it new lumber, do you know?

A. It was mostly new lumber.

Q. New?

A. Yes.

Q. You say mostly new. Well, could you tell whether or not [2010] it was lumber that had been used on a job, that is, covered with cement or otherwise, or not?

(Testimony of Arthur Anderson.)

A. No, I couldn't tell; I didn't pay any attention to it.

Q. Did you see any what you would call used lumber? A. How's that?

Q. Did you see any that you would call used lumber, as against the usual lumber that was being furnished—second hand lumber? A. No.

Q. You saw second hand lumber, or saw none, which?

A. I saw second hand lumber that they remodeled forms with, sure, but you get that all the time; I didn't pay no attention to it.

Mr. Holman: Would you read that answer?

(Whereupon, the reporter read the last previous answer.)

Q. In other words, may I understand, when you say second hand lumber, you mean lumber that has been used before on the job, or elsewhere?

A. Lumber that's been used before on the job.

Mr. Holman: That's all.

#### Recross-Examination

By Mr. Olson:

Q. Were you superintendent on this Murphy-Campbell job, Mr. Anderson? A. Yes. [2011]

Q. Isn't it a fact that your bonding company had to take over that job?

Mr. Holman: I object to that, your Honor, as wholly outside the issues.



(Testimony of Arthur Anderson.)

The Court: Sustained.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Hawkins: No further questions.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The Court will recess for five minutes.

(Short recess.

(All parties present as before, and the trial was resumed.

(Whereupon, part of Macri weekly payroll reports, week ending August 16, 1944, to week ending December 13, 1944, was marked Defendant Macri's Exhibit No. 15-a for identification.

(Whereupon, summation of items 12, 13 and 15 and 16 on specification 1068 was marked defendant Macri's Exhibit No. 91 for identification.)

### ELIZABETH CALLAHAN

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

#### Direct Examination

By Mr. Holman: [2012]

Q. Miss Callahan, have you at my request compiled the charges applicable to specification 1068, contract 12r-14996?—

A. Yes, I have.

(Testimony of Elizabeth Callahan.)

Q. —involved in this action, for the purpose of determining, for the purpose of setting forth, the total actual cost of performance of that job——

A. On concrete.

Q. —with respect to item 12, concrete in structures, item 13, placing re-enforcement bars, item 15, erecting timber in structures, and item 16, installing gates and miscellaneous metal work?

A. Yes.

Mr. Hawkins: Specification what?

The Court: 1068. I take it, Mr. Holman, that would have been involved in Mr. Schaefer's contract had he performed it, under 1068?

Q. That's correct, your Honor. That's correct, isn't it? A. Yes.

Q. Now, handing you what has been marked Macri's identification 91, is that the summation of the expenditures? A. Yes, it is.

Q. With reference to the first item, "Labor November 22, 1944, to November 15, 1945, inc."; does that mean inclusive? [2013] A. Yes.

Q. \$49,323.62; from where did you get that?

A. It is from the daily reports of the superintendent, and the payrolls.

Q. The payroll reports? A. Yes.

Mr. Hawkins: Your Honor, apparently that's going into the record, that figure, as evidence of that cost.

Mr. Holman: Well, leave the cost items out; no objection to striking that item as to figure; I just want to identify the entry.

(Testimony of Elizabeth Callahan.)

The Court: This is just preliminary, I assume.

Mr. Holman: I'll not quote figures.

Mr. Hawkins: From the way it was going in, it was going into the record as the figure, as evidence.

Mr. Holman: I have no objection to having the figure stricken.

The Court All right, it will be stricken out.

Direct Examination

(Continued)

By Mr. Holman:

Q. All right, then the second item, payroll taxes, four and a half per cent of the above, is that comprised of the next three items below?

A. The next four.

Q. The next four items; would you read those off, please?

Mr. Olson: Pardon me, do you have extra copies of [2014] that? A. I have.

Mr. Holman: Do you have one Mr. Olson can follow?

Q. (By Mr. Holman): The four items there, if I may lead, counsel, I can save a lot of time on identification, are the four classifications that you've shown, is that correct? A. That's right.

Q. Then the next item, item 3, rental of equipment, H. H. Walker, Inc., how was that item determined?

A. From the information given to me by the superintendent and by Mr. Macri, the portion of

(Testimony of Elizabeth Callahan.)

the equipment that was applicable to concrete.

Q. And do you have any bills in payment of that?

A. Oh, yes, I have the bills and the cancelled checks.

Q. Fourth, the rental of equipment owned by Macri and Company, A, one GMC two-ton truck with flat bed, eight months; how did you arrive at that?

A. The time is given to me by the superintendent, and the price is according to my O.P.A. book.

The Court: Is this the first time Miss Callahan has been on the stand?

Mr. Holman: No.

The Court: Oh, she was identified as Mr. Macri's bookkeeper; I wasn't sure about that. [2015]

Mr. Holman: Yes, sir, in connection with this identification.

Q. (By Mr. Holman): The next item, one three quarter horse power vibrator, what does that H.P. stand for? A. Horse power.

Q. And the words "eight months" and added figure, where did you get that information?

A. The time is from the superintendent; the price is from the O.P.A.

Q. Is that true of the next item also, swing saw?

A. Yes.

Q. Taking item 5, Martin & Son, ready-mixed concrete, from where did you get the figure for that item? A. That's his contract price.



(Testimony of Elizabeth Callahan.)

Q. Do you have the bills or anything for that?

A. I have the bills and the cancelled checks.

Q. And Item 6, Potlatch Yards, Inc., nails and wire, etc., is your answer the same with respect to that?

A. I have the bills and checks.

Q. Item 7, Seattle steel company, where do you get the figure for that?

A. From the Seattle Steel bills; part of it is rental and part of it is purchase.

Q. And this item 8 is a purchase item, or rental item?

A. 8 is purchase. [2016]

Q. Yes; then item 9, Yakima Hardware, wire and miscellaneous, is your answer the same as to that?

A. Yes.

Q. From their bills, is that correct?

A. That's right.

Q. Item 10, Pioneer Sand and Gravel Company, Sealcure and freight.

A. I have the bills and checks.

Q. Item 11, Northwest Engineering Company, rental, \$781.21—strike the figure, please; where did you get that from?

A. From the bills.

Q. Item 12, Ray Shingshang, placing re-enforcing steel, where did you get that figure?

A. That's the amount of his actual pay checks on that particular job.

Q. 13, unloading cement from cars and placing on the job, Glen Gentry and Harvey Hofsted, where did you get that?

A. That's from the bills and checks.

(Testimony of Elizabeth Callahan.)

Q. Then the total cost to Macri is the total of the items you have indicated? A. Yes.

Q. And the next item, sub-contract price on quantities and Bureau final estimate number 16, you got those figures from where?

A. From the final estimate 16. [2017]

Q. Yes; and then is it true that you deducted that item from the total of the items above?

A. That's right.

Q. Now, I see you have a line drawn through there, and below that the sub-contract price on quantities, and the Bureau final estimate, the yardage, and the price per yard. Where did you get that price per yard?

A. Well, that's an explanation of my figure, as to how I arrived at it; that's from final estimate 16.

Q. Where did you get your price per yard?

A. From the sub-contract.

Q. And is your next item with respect to pounds of re-enforcing bars from the same source?

A. That's right.

Q. And is your next item, item 15, 17.184 MFDB at \$35.00, what is that?

A. That's thousand feet board measure.

Q. I didn't hear you.

A. It is board measure.

Q. Yes, and the price you got from where? Is it a sub-contract price?

A. Yes, it is a sub-contract price.

Q. Or is it a price that you have off of bills? I don't understand what that item is. Passing that

(Testimony of Elizabeth Callahan.)

for a minute, Miss Callahan, the next item, pounds installed, gates, at [2018] 3 cents per pound, where did you arrive at that?      A. The sub-contract.

Q. Do you wish to make any further inquiry as to identification, counsel?

Mr. Hawkins: I have no inquiry at this time.

Q. Now, taking the first item, Miss Callahan, I believe you said that was from the payroll?

A. Yes.

Q. And handing you plaintiff's identification 21 for identification, I'll ask you whether or not the items in 21 were prepared by you? Just check it through for handwriting; as the ones furnished the government.      A. Must be.

The Court: Which one is that?

Q. That's Macri's identification 21, your Honor.

A. Must be; it's my handwriting.

Q. That's your handwriting?      A. Yes.

Q. And the duplicate of that did you keep, did you retain?      A. Yes.

Q. And was it from that duplicate that you got that?      A. That's a carbon copy.

Q. What was the total amount of that payroll?

Mr. Hawkins: I object to that, your Honor. I don't think it's been properly established. Is this exhibit [2019] in evidence, Macri's 21?

The Clerk: No, it is not. It is an identification.

Mr. Hawkins: Hasn't been properly qualified.

Mr. Holman: I will offer in evidence at this time Macri's identification 21 in its entirety, your Honor.

(Testimony of Elizabeth Callahan.)

The Court: Is that Mr. Macri's payroll on 1068?

Mr. Holman: In its entirety, your Honor?

Mr. Olson: If your Honor please, on behalf of the use plaintiff we object to its introduction on the grounds that at this time it is wholly immaterial, irrevelant, and incompetent, for the reason that as against Mr. Schaefer there is no foundation laid for its introduction into evidence. The testimony to date shows that Mr. Macri unlawfully took over the performance of 1068 without ever having tendered performance on his part of the things that were necessary, and a condition precedent to any obligation upon Mr. Schaefer to commerce work. The testimony, all the testimony, is that the fine grading did not commence until the 5th day of February, 1945, on 1068, and at that time Macri and Company had already taken over the building of forms and the performance of the work called for in the sub-contract. The testimony is uncontradicted that on November 30, when they served notice [2020] upon us to proceed, and upon January 3, when they notified us we were in default, there wasn't any place upon which Concrete Construction Company could work, and it goes without saying, your Honor, that you have to have an excavation fine graded before you can start assembling forms or pouring concrete. Now, there has been no testimony whatsoever that they ever got in that position and then gave the Concrete Construction Company an opportunity to perform 1068. The testimony, all of it, is, your Honor, that the Macri



(Testimony of Elizabeth Callahan.)

Company took over the building of forms and the assembling of panels before there was any holes ready for the Concrete Construction Company to work in.

Mr. Holman: That, your Honor, I submit is a matter of law to be argued to the Court with due respect to the exhibits that are in, and regardless of that, this is a factual matter that has to be proven, and if counsel's position is that your Honor must pass upon that before there is any evidence to be considered with respect to 1068, then that's one question, but your Honor has already admitted a great deal of evidence with respect to 1068, and I think this is in due course of proof with respect to the position of the cross-complainant Macri as against the cross-defendants Schaefer in 1068.

The Court: Well, it would be material if there is [2021] an issue as to whether or not Mr. Schaefer breached his contract with the Macri Company with reference to 1068. I assume that still is your contention?

Mr. Holman: Oh, yes, it is, your Honor.

The Court: That the breach was on the plaintiff, and without fault on yourself?

Mr. Holman: Entirely.

The Court: And if evidence is to be introduced on that point, then this would be material, of course. My recollection of the testimony so far, as far as the factual situation is concerned, is as stated by Mr. Olson, that there isn't any evidence, that is, that the excavations weren't ready for any operation

(Testimony of Elizabeth Callahan.)

by Mr. Schaefer at the time this notice was given; that's the evidence there is so far, as I recall it.

Mr. Holman: Well, with respect to Macri's case that's probably a correct position, your Honor. If this is premature then I will withdraw Miss Callahan from that phase of it, because we will go into that in its entirety, but I frankly had figured on——

The Court: Well, if it is just a question of order of proof, I don't care about that, you can put it in now; I wouldn't want to have a whole lot of evidence go in here that isn't going to be useful in determining the controversy, or that the Court wouldn't have occasion [2022] to use.

Mr. Holman: The thing that suggests itself to me, your Honor, is one that as we progressed, we passed, and that's the letters of Mr. Nelson in connection with his deposition, which are quite pertinent in connection with 1068 too, and I wish those to be considered too by the Court. They have not been offered in evidence yet.

The Court: You mean Mr. Nelson in his letters to Macri stated a situation that would indicate that Mr. Schaefer breached his contract on 1068?

Mr. Holman: Indicates with respect to the progress, at least, your Honor, on 1062 as affecting 1068, yes.

The Court: Well, those letters haven't been offered, or at least the offer wasn't pressed, so that they're not before the Court, the letters are not, at this time.

(Testimony of Elizabeth Callahan.)

Mr. Holman: Well, I'd like at this time to offer them, then, your Honor, and have Miss Callahan stand aside, because this is a matter that naturally will depend on the determination, or at least a showing to the court that there was a breach of contract, and that is part of the reasoning.

The Court: All right.

Mr. Holman: I have one question I would like to ask Miss Callahan while she is on the stand, your Honor. [2023]

Direct Examination  
(Continued)

By Mr. Holman:

Q. Miss Callahan, did you at my request make a copy of the portion of Macri's Exhibit for identification 21 covering the weeks ending August 16, 1944, to and including December 13, 1944, as evidenced by Macri's identification 15-a?

The Clerk: Mr. Holman, you said Macri's 21.

Mr. Holman: Identification, isn't it?

The Clerk: Then this should carry 21-a, instead of 15-a; 15-a refers to 1062. Is this part of 1068?

Mr. Holman: Oh, I beg your pardon, yes, Macri's 15, instead of 21. Mr. Taylor, can you change that?

Witness: Yes, it is.

Q. And is that a full, true and correct copy of that portion of the payroll?

A. Yes, it is an exact copy.

Mr. Holman: This, your Honor, is offered in evidence at this time as encompassing the period of

(Testimony of Elizabeth Callahan.)

employment while the witness Stickney was in charge of the Macri operations. Your Honor will recall that Mr. Stickney partly checked it, and then on counsel's objection did not continue.

The Court: What is that identification?

Mr. Holman: 15-a, your Honor.

The Court: And that's a section of the Macri payroll [2024] on 1062?

Mr. Holman: On 1062, yes. I'd like to offer it in evidence for the purpose of being considered with the testimony of the witness Stickney.

Mr. Olson: For what purpose, do you say?

Mr. Holman: Considering it with the testimony of the witness Stickney. It carries his name throughout, and the witness already, your Honor, has identified into the evidence the writings on the original payroll for the week ending October 4, 1944, and the week of October 11, 1944, and the week of October 18, 1944, and the week of October 25, 1944, and the week of November 1, 1944, with respect to truck hire, as covered by his testimony.

The Court: That was identified by the witness Stickney?

Mr. Holman: Yes, your Honor, these pages, this portion of the payroll, was identified by the witness Stickney as covering the period that he was employed in the position he so testified about.

Mr. Olson: Your Honor, our objection is also to the introduction of Mr. Macri's payroll. Mr. Stickney, your Honor will recall, while he was one of Macri's superintendents, he was called by the



(Testimony of Elizabeth Callahan.)

plaintiff as a witness. I don't see what counsel has in mind, but I don't see how Mr. Stickney having testified places in evidence [2025] that portion of the payroll covering the time he was Macri's superintendent. Obviously anything that's in this document now offered as a part of Macri's case are self-serving statements. Frankly, I don't know what it is offered for. If it is offered to show cost, then it is just as objectionable as the whole payroll, what it cost Mr. Macri to perform—this is on 1062?

Mr. Holman: 1062.

Mr. Olson: Then I just don't understand the function of it, your Honor. I object to it as being immaterial so far as any issue that I know of or can think of is concerned.

Mr. Holman: Well, it does show the portion of the time that Mr. Stickney served. Now, this is on cross-examination of Mr. Stickney, their witness, and he identified those pages and was comparing this particular 15-a with that at the time when he stopped on counsel's objection and your Honor's suggestion that he didn't have to, and that has been done now, and I think it is entitled to go in evidence as Macri's showing of the man power that he had during that particular time when he was there. It is a matter of defense.

The Court: Let me see that. This witness now on the stand identified this as part of the Macri payroll?

Witness: During the time Mr. Stickney was there. [2026]

Mr. Hawkins: Isn't that a copy?

(Testimony of Elizabeth Callahan.)

Mr. Holman: A true and correct copy, yes.

The Court: It is a copy. Is there any objection made to it on the ground that it is a copy, rather than the original?

Mr. Hawkins: I thought she testified that was a copy, rather than the original.

The Court: I think that's right. I just wanted to know if there was any objection on that ground.

Mr. Hawkins: I have no objection on the ground it is a copy. I still don't think it's been properly identified. I don't recall that Mr. Stickney testified he prepared that original payroll.

Witness: It is in his handwriting.

Mr. Holman: Yes, she testified it is in his handwriting.

The Court: Well, I'll overrule the objection and admit it in evidence. As I recall, Mr. Stickney testified as to the men that had been furnished to him, or the labor that had been furnished to him in connection with the prosecution of this work, and the tenor of his testimony was that it wasn't adequate. If this is a payroll prepared by him, or at least in his handwriting, during the period, I think it would be material, and the objection will be overruled. [2027]

(Whereupon, defendant Macri's Exhibit No. 15-a for identification was admitted in evidence.)

Mr. Holman: Will you stand aside, Miss Callahan?

(Whereupon, the witness Elizabeth Callahan

was temporarily excused from the witness stand.)

Mr. Holman: I would like now, your Honor, to make application that the respective exhibits attached to the Nelson deposition be admitted in evidence.

The Court: None of them have been admitted so far, have they?

The Clerk: No, sir. Are you going to take them up separately?

The Court: I suppose we should. Of course, there is a question that I presume will be in a way common to all of them, as to whether these letters are admissible, and we may as well; aside from the hearsay in some of the contents, I think Mr. Olson raises the general objection to at least the ones not directed to or called to the attention of Mr. Schaefer, that they are not admissible.

The Clerk: The letter that was marked as "A" to the deposition is now marked Macri's Identification 79.

(Whereupon, letter marked as "B" to Nelson deposition was marked defendant Macri's Exhibit No. 92 for identification. [2028])

(Whereupon, letter marked as "C" to Nelson deposition was marked defendant Macri's exhibit No. 93 for identification.)

(Whereupon, letter marked as "D" to Nelson deposition was marked defendant Macri's exhibit No. 94 for identification.)

The Court: Are you making an offer of these, Mr. Holman?

Mr. Holman: Yes; I thought the Clerk was marking them serially through.

(Whereupon, letter marked as "E" to Nelson deposition was marked defendant Macri's Exhibit No. 95 for identification.

(Whereupon, letter marked as "F" to the Nelson deposition was marked defendant Macri's Exhibit No. 96 for identification.

(Whereupon, letter marked as "G" to Nelson deposition was marked defendant Macri's Exhibit No. 97 for identification.

(Argument to the Court on the admissibility of defendant Macri's Exhibits for Identification 79, 92, 93, 94, 95, 96, and 97.)

The Court: I don't think the letters are admissible. They're not written to Mr. Schaefer. They're simply letters written by an engineer of the Bureau of Reclamation to one of the parties in this case. There are direct ways in which it can be proven that the work wasn't performed [2029] on time. Mr. Nelson could have testified to that; his deposition was taken; you could have asked him what the progress of the work was. If that's the purpose of these letters it doesn't seem to me they are proper or material, and the objection will be sustained.

(Whereupon, defendant Macri's Exhibits No. 79, 92, 93, 94, 95, 96, and 97 for identification were rejected.)

Mr. Holman: Would the Court indulge me to the extent of fifteen minutes? Your Honor said



we would go until 4:30, and on account of this break with Miss Callahan, I just don't like to start in on something that is not constructive.

The Court: Well, one difficulty in this case has been that the last half hour of every day has been almost valueless, because we just didn't seem to make any progress during that time. I think we ought to progress the way a lawsuit is usually tried, put the witnesses on and examine them and be through with them. I must insist that after this you have your witnesses ready and be ready to proceed through the session of the Court. I'll adjourn now until 9:30 tomorrow morning.

Mr. Holman: May I do one thing before we leave? Mr. Olson has requested certain telephone calls. Miss Callahan has those, and will furnish them to you. Do you [2030] want to examine her on the stand about that?

Mr. Olson: I would like to take a look at them.

The Court: You might as well bring them out now.

Mr. Holman: May I state to your Honor that I called Mr. King, as I told your Honor I would, during the noon recess, and talked to him, and he said he would either have his doctor's certificate wired to the Clerk so it would be here tomorrow morning, or if the doctor thought he could instead come, that he would be here tomorrow morning. I explained the situation.

The Court: What was Mr. King's position with reference to this?

Mr. Holman: Your Honor, he had a definite period of supervision of the work.

The Court: Was he one of Mr. Macri's superintendents?

Mr. Holman: Yes, your Honor. Do you want Miss Callahan on the stand?

Mr. Olson: Wait until I see what we've got here.

Mr. Holman: Do you want the Court to remain?

Mr. Olson: Well, I think we can use this time.

The Court: All right.

#### ELIZABETH CALLAHAN

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

#### Cross-Examination

By Mr. Olson: [2031]

Q. Miss Callahan, showing you plaintiff's identification 98, is that a list of Mr. Macri's telephone numbers?

(Whereupon, list of Macri telephone numbers was marked plaintiff's Exhibit No. 98 for identification.)

A. Yes, it is, in Seattle.

Q. In Seattle for 1944? A. Yes.

Mr. Olson: We offer 98 in evidence.

Mr. Hawkins: We have no objection.

Mr. Holman: I have no objection, your Honor. I don't know the probative value of it, but I don't object.

(Testimony of Elizabeth Callahan.)

Mr. Olson: I can see where counsel would make that observation, and I'll state I have here in my hands—and I agree, your Honor, we're getting on something not too material, but Mr. Macri was very emphatic he was the one that called Mr. Schaefer on June 14. Now, I have in my hands Mr. Schaefer's long distance toll call for June 14, 1944, showing the numbers that were called, and I want to show what Macri's numbers are.

Mr. Holman: All right.

Mr. Olson: Now, the reason I'm asking for this was I want to see if they've got a long distance phone call for June 14 from Seattle to Mr. Schaefer. Maybe they have. [2032]

The Court: Well, suppose you check them up first, and just hold this identification. I'll reserve my ruling on the admissibility of it.

Mr. Olson: Well, I thought they had that one for June, 1944.

A. I understood you to ask me for all of them.

Q. (By Mr. Olson): No, June, 1944. That's the particular one I'm interested in, was June, 1944.

A. Well, of course, you see a phone call might be recorded in July.

Q. I think it would be.

A. Sometimes it depends on the time of the month.

Q. That's the one, at least, the one I have is a July statement, so I think yours should be a July statement covering June calls.

A. Would you like to hold those?

(Testimony of Elizabeth Callahan.)

Q. This is July right here, isn't it?

A. Yes, but there are many different phones, you see.

Mr. Hawkins: Your Honor, I wonder about the admissibility of any of this anyway. I suppose it is offered for the purpose of impeaching Mr. Macri as to who called whom. That's pretty clearly a collateral matter. After all, they admit they signed the contract. If they had 40 calls and didn't sign the contract, it would be immaterial to this lawsuit.

The Court: It would seem to me it would be too collateral for impeachment purposes.

Mr. Olson: Your Honor, that's the purpose of the—in other words, Mr. Macri testified very positively that he called Mr. Schaefer on the phone, and I wanted to show that's not so.

Mr. Hawkins: This was before the contract was signed, however.

Mr. Olson: No, this was afterward, on June 14. June 15 they met on the ground, and Macri testified he called Schaefer and said "Why don't you get on the job," and arranged to meet on the field.

The Court: I see. You haven't the date here yet?

Mr. Olson: Yes, I think we have.

Q. (By Mr. Olson): You have the July statements covering the June long distance calls?

A. June and July.

Q. Well, now, see if you can find where you called to Portland.

A. What is the number in Portland?



(Testimony of Elizabeth Callahan.)

Q. Well, see if you can find any calls to Portland.      A. Well, don't you know his number?

Q. No, I don't.

A. No, I mean Mr. Schaefer's number.

Mr. Hawkins: It's right in your hand. [2034]

Mr. Olson: Why should it be in my hand?

Mr. Hawkins: Isn't that a telephone bill of Schaefer's?

Q. The two numbers, home phone is East 4754, and the office is Lancaster 4181. Mr. Schaefer's home is East 4754.

A. Yes, these calls to Portland here; a call on June 22; would that be the one?

Q. June 14 would be the one.

Mr. Hawkins: Not only is this collateral, your Honor, but also the evidence, if any, will be based upon the telephone company's bill, which is not competent evidence of the calls. He might have used another telephone in somebody else's office.

The Court: Suppose you look for those over the adjournment period, and see if you can find them. The Court will adjourn until tomorrow morning at 9:30. Counsel should take note of the hour; it is 9:30 instead of 10 in the morning.

(Whereupon, the Court took a recess in this cause until Tuesday, March 18, 1947, at 9:30 o'clock a.m.)

Yakima, Washington, Tuesday, March 18, 1947,  
9:30 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, the Clerk hands me this [2035] telegram addressed to him: "It is now unsafe for Mr. S. R. King to make an extended trip. He has recently had the cast removed from his arm, and there is danger of re-traumatization. Dr. West." I would like to file that telegram, and I would like to file Mr. King's prior telegram.

The Court: All right.

Mr. Holman: Call Mr. Ashley to the stand.

### VERNE E. ASHLEY

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Your name, please, and your place of residence?      A. Verne E. Ashley.

Q. Where do you reside?      A. I beg pardon.

Q. Where do you live?

A. Coeur d'Alene, Idaho.

Q. Mr. Ashley, what is your profession?

A. Civil engineer.

Q. Will you state your qualifications and experience, please?

A. Well, my education consisted of three and a

(Testimony of Verne E. Ashley.)

half years in college engineering work. I started in the engineering practice in 1921. I have the state professional license of the State of Idaho, by examination in 1938. I've worked for the State Highway Department of the State of [2036] Idaho, the United States Engineers, Seattle District, and at the present time I have my own business.

Q. Located where?

A. Located in Coeur d'Alene, Idaho.

Q. Now, were you employed on the Roza Project, on specification 1062, schedule 1? A. I was.

Q. When were you there, and for how long a time were you there?

A. The approximate dates would be June 18, 1944, to August 15, 1944.

Q. And for part of that time were you and Mr. Staples there together, or not? A. We were.

Q. For about long, do you remember?

A. Oh, roughly a week or ten days.

Q. A week or ten days, yes, sir.

The Court: I didn't get the last date, in August.

A. August 15.

Q. I'll ask you whether or not at the time you came on to the work the crew of the Concrete Construction Company was on the job or working?

A. Well, I believe they had possibly one or two men on the job at that time.

Q. Do you remember who they were? [2037]

A. Well, I wouldn't know their designation by payroll, but they were working in the lumber yard on forms.

(Testimony of Verne E. Ashley.)

Q. And I'll ask you whether or not you had any conference on the job with Mr. Nelson with respect to progress of the job about that time?

A. Yes.

Q. Did you communicate that conference, the result of that conference with Mr. Nelson, to Mr. Macri?

A. I did.

Q. Will you tell me whether or not you communicated the results of that conference to Mr. Schaefer?

A. I did.

Q. How did you communicate with Mr. Schaefer?

A. By 'phone.

Q. By telephone?

A. By telephone.

Q. From where, do you remember?

A. From the Sunnyside office.

Q. And do you recall the approximate time?

A. Well, it was within a very few days after I got on the job. I would say approximately the 20th or 21st or 22nd of June.

Q. Now, in that communication to—M. C. Schaefer is the one I'm talking about; is that the one you're talking about? [2038]

A. M. C. Schaefer is correct.

Q. In that communication with him will you tell the Court the substance of what you told him?

A. That we considered we had sufficient structures excavated ahead for them to place the forms and get started on the concrete work. Mr. Nelson had been on the job I believe the same day and had asked me what was the delay in getting the form work going, and of course ultimately place the con-



(Testimony of Verne E. Ashley.)

crete, so I called Mr. Schaefer to that effect, and the fact that we had sufficient holes excavated ahead ready for the placing of forms.

Q. Can you recall the approximate number of holes that were ready for placing forms before Mr. Staples left, while you were there?

A. Oh, we roughly checked through, and as I recall it was around 150 holes that he had excavated and fine graded.

Q. What, if any, statement did Mr. Schaefer make to you, if you recall; that is, in that telephone call?

A. Well, Mr. Schaefer was very anxious to make sure that there were sufficient holes or excavations made so that they could move in immediately and start to work and continue their operation.

Q. Now, did you then see Mr. Schaefer on the job?

A. Oh, yes, Mr. Schaefer was on the job.

Q. And were you present at a meeting in the—you said you [2039] came about June 18, did you?

A. Approximately June 18, yes.

Q. Do you remember whether or not you made any inspection of excavations as to any holes that had been complained of, or structure excavations that had been complained of by Mr. Schaefer or his superintendent? By the way, who was the superintendent when you first went on there? Who was the first superintendent you saw?

(Testimony of Verne E. Ashley.)

A. I believe Mr. Waltie, I believe, came first, and then Mr. Darcy, or it may have been just the opposite. I don't recall exactly.

Q. Well, was there any complaint made to you by either Mr. Waltie or Mr. Darcy as to holes, or was there complaint made by Mr. Schaefer?

A. There was discussion, soon after the men arrived, that is, Mr. Schaefer's organization, there was discussion as to the fact that they had been having some trouble with certain excavations, and we went back out and checked through a good many of them.

Q. Can you tell me approximately the time of their arrival with respect to July 4, whether it was around that time?

A. Well, actually, I would say it was probably July 5 or 6. One or two, I wouldn't say whether it was Mr. Waltie or Mr. Darcy, came in July previous to the 4th of July, and then some men came in on the 5th or 6th of July. [2040]

Q. Now, after they arrived, about how large a crew was there then, if you recall, I mean at that time?

A. Oh, around from eight to ten men.

Q. And of that do you recall approximately how many were carpenters?

A. Probably five. Five or six.

Q. Did you make any check of the holes after these men arrived?      A. I did.

Q. About how many did you inspect and what condition did you find them in? When I say holes, I'm talking about the excavations for structures.

(Testimony of Verne E. Ashley.)

A. Well, first of all, I went through those that apparently there was some complaint regarding the holes, and attempted to check every hole, but then that wasn't necessary always. However, if there was any question about the hole, as to whether it was excavated sufficiently to place the forms, why, a check was made on the hole.

Q. Well, I'm interested in whether or not you made any check as the result of the indications by any of the Schaefer crew; did you do that?

A. I don't understand your question.

Q. I'm interested in whether or not you made any check of any designated holes by reason of the complaint of any of the Schaefer crew after they got there. [2041]

A. Yes, I did.

Q. And what did you find with respect to those, as to whether they were right or needed work, or what?

A. There were a few holes that were not right.

Q. Do you remember about how many you found?

A. Oh, possibly half a dozen.

Q. And will you tell me whether or not those were corrected by you?

A. They were.

Q. What, if any, instruction did you have with respect to securing lists of lumber from the Schaefer crew when they returned?

Mr. Olson: Is this from Mr. Macri?

Mr. Holman: Yes, but the instruction, I'm not quoting it.

Mr. Olson: I object, your Honor, to relating instructions given by Mr. Macri.

(Testimony of Verne E. Ashley.)

The Court: With reference to lumber, is that?

Mr. Holman: Yes, your Honor. This is a new engineer on the job. I want to know whether or not he had instructions with respect to lumber.

The Court: He can say whether or not he had instructions. I think the material thing is what he did.

Q. (By Mr. Holman): Did you have instructions, Mr. Ashley? [2042] A. I did.

Q. Will you tell me whether or not those instructions included securing the lists of lumber?

Mr. Olson: If your Honor please, that's going into the contents of what the instructions were again. He asks did they include this or that.

The Court: I think the material thing is what was done here, what he attempted to do.

Q. (By Mr. Holman): Very well. Will you tell me what you did with respect to grasping the situation as to lumber? What did you do with respect to the job and with respect to the Schaefer crew?

A. There was considerable discussion on the lumber situation.

Q. Between whom?

A. Between Mr. Schaefer's representative on the job, and myself.

Q. Who was that?

A. In most cases Mr. Darcy, and I asked him to submit to me a list of the lumber that they were going to need to complete the job.

Q. Was that done?



(Testimony of Verne E. Ashley.)

A. There was never a list given me as representative of the total amount of lumber required to complete the form building.

Q. Will you tell me whether or not there were any oral requests made for lumber, as emergent matters? [2043]

A. There were several. Of course, lumber was a critical situation at the time, and we attempted to watch it as closely as possible and keep on hand sufficient lumber to keep his carpenters going.

Mr. Olson: I move that answer be stricken, your Honor, as not being responsive.

The Court: I'll deny the motion.

Q. Will you continue, Mr. Ashley?

A. I recall on instances Mr. Darcy would come and tell me that they would be out of two by fours.

Q. What did you do then?

A. One particular time, especially, he told me, it was just after quitting time or just at the beginning of the following day, we pulled the crew in and went into Sunnyside, the retail yard, and got what we could in the way of two by fours. That occurred all the way through the month of July. There were several instances where we went in to the retail yard at Sunnyside and purchased two by fours and whatever we could get.

Q. When you say "pulled the crew in" whose crew was that?

A. That was our crew, out on the finishing of the structures. We would have two or three men, bring them in to the yard, get the truck, and go to town.

(Testimony of Verne E. Ashley.)

Q. Would it be the Concrete crew or the Macri crew?      A. It would be the Macri crew. [2044]

Q. Handing you what has been marked identification 85, do you recognize that, Mr. Ashley?

A. I do.

Q. From what source did you secure the quantity of material as shown by that identification 85?

A. From Mr. Darcy.

Q. And for what purpose was that list of lumber furnished?

A. As it states here in the memo, "concrete chute and stilling pool."

Q. Now, at the time that list was furnished, was the stilling pool and chute ready for the placing of forms, or not?      A. It was not.

Q. And was it in due course for performance at that time, or for later performance?

A. Well, for later performance.

Q. And what did you do with that?

A. Submitted it to Mr. Macri's office in Seattle.

Mr. Holman: I now offer in evidence, your Honor, Exhibit 85 for identification.

The Court: It will be admitted.

(Whereupon, defendant Macri's Exhibit No. 85 for identification was admitted in evidence.)

Q. Can you tell me whether or not at the time of presenting 85 Mr. Darcy asked for that for immediate delivery, or for a later delivery? [2045]

A. He was quite urgent about the delivery of this particular order.

(Testimony of Verne E. Ashley.)

Q. Did you have any conversation——

Mr. Olson: Let's let him finish, or was he through? Were you through, Mr. Ashley?

A. Yes.

Q. Did you have any conversation with him as to the character of that material called for by that bill, by that order?

A. What do you mean by the character of it?

Q. Well, the material of which it is made up; did you have any conversation with him about that, with Mr. Darcy?

A. I don't quite understand just what you mean.

Q. Do you recall the type of lumber that he asked for, for the stilling pool?

Mr. Olson: Now, your Honor, I submit that all counsel has to ask this witness is was there any conversation at the time this lumber was ordered, without suggesting to him what was said.

Mr. Holman: I'm not suggesting what was said, and I don't intend to suggest, and I would very much appreciate counsel, if he wants to object——

Mr. Olson: It doesn't do me any good to object after he's already told him what to say.

The Court: Just ask him about the conversation.

Q. (By Mr. Holman): Was there any conversation about that [2046] character of lumber at that time, if you recall it?

A. Well, the question of lumber, Mr. Darcy was asking for the best grade of lumber possible; now, that's the only reference I can make to it.

(Testimony of Verne E. Ashley.)

Q. You can't recall any specific conversation; I'll ask you whether or not at the time of sending that in you communicated currently with Mr. Macri in respect to that order?      A. I did.

Q. When you came there can you tell me with respect to the Macri equipment? First the Laraine hoe; what do you know of that, Mr. Ashley?

A. Well, when I arrived on the job, the Laraine hoe was in the process of being overhauled. At the time I got there the tracks had been repaired, new pads put on, and then we continued that process of overhauling the Laraine by sending the motor in to Yakima, to the Yakima Iron Works, to be repaired, rebored, the clutch was overhauled, and there was considerable work; from the time that I arrived on the job there were two men working on the Laraine hoe in repair work all the time up until about the first of August.

Q. You say to about the first of August?

A. That's right.

Q. And can you tell me whether or not it was completed and [2047] ready for use before you left?

A. Yes, it was completed and ready to use. I had not taken it out in the field as yet, but it was ready to go out in the field.

Q. While that was undergoing process of repair was there any substitution for the Laraine hoe?

A. Yes, there was a rented hoe on the job.

Q. Remember the name of the owner of that hoe, or the type of hoe?

A. Well, Mr. Mullins was the owner.



(Testimony of Verne E. Ashley.)

Q. Do you remember the type of hoe?

A. Well, it was a half yard hoe.

Q. You don't remember the name of it?

A. No, I don't.

Q. Was that operating steadily, or not?

A. It was operating steadily; it was in very good mechanical shape.

Q. By the way, you wouldn't know where the Laraine came from except by hearsay, would you; you didn't know?      A. No.

Q. And what with respect to any Caterpillar tractor?

A. There was a small Caterpillar on the job, which needed some repair work while it was there; the men worked on that and put it into shape. It was used for back filling. After it was repaired it was apparently in good condition. [2048]

Q. And what with respect to trucks? I'm speaking now of the Macri equipment.

A. Well, there was a ton and a half International truck that was in very good condition, on the job; there was a G.M.C. pickup that wasn't in too good a condition, it was receiving very rough usage, and it was very difficult to have any repair work done at that time without holding up the crews, and we were using the G.M.C. pickup to move the men around from one excavation to another, so it was in need of repair at most times. The reason it wasn't repaired was the fact that we just had to use it, and didn't take the time to get the repair work done. Then there was a Ford pickup sent to the job, which was in fair condition.

(Testimony of Verne E. Ashley.)

The Court: What was the capacity of the Laraine hoe; is that in the record?

Q. What was the Laraine capacity, Mr. Ashley?

A. A half yard.

Q. The same as the other one? A. Yes.

Q. Can you tell me whether or not at any time you supplied any men to the Concrete Construction Company crew for the purpose of doing any excavation work co-ordinated with form setting?

A. Yes, I did. [2049]

Q. Tell me what the circumstances were, please.

A. That was right at the beginning of the work at the time I was there. There were occasions when complaints were made regarding the excavation in the structure. In going back and looking at the structure to see just what the complaint might be, it was in most instances just a small amount of material to be moved, so I suggested to Mr. Darcy, "Well, we'll put a couple of our men, Macri's men, back on that part of the work to follow you along; in the event that there is a small amount of shovel work, that is, hand shoveling, to be done, why, we'll do it," and oh, that lasted for two or three days, and then Mr. Darcy came in and said the men were in his way, he'd rather not have them back there, so that's all that came of that procedure.

Q. Now, will you tell me whether or not you saw any evidence of difficulty in removing forms from the concrete structures after placement?

A. No, I can't say that I saw any extreme difficulty in removing the forms, and I noted, too, that

(Testimony of Verne E. Ashley.)

the forms, the concrete itself, showed no indication of it. As a rule, if you're having extreme difficulty in removing your form, why, the concrete is green, it will be chipped and it is very evident, but I saw nothing of that.

Q. Now, did you superintend the operation of the hoe in [2050] making excavations while you were there?      A. I did.

Q. Will you explain to the Court how the hoe operated with respect to digging excavations and with respect to sloping excavations, if there was any slope?

A. Well, the action of a hoe in digging, of course, what we were primarily concerned about in excavating these was to endeavor to give sufficient room for the placing of forms, and when the hoe went into a structure or to a structure where the structure was staked out, the front part or back part we didn't have to worry about, because the natural operation of the hoe goes in such a way that you can't do anything else but slope it. Also the sides, the side walls that were excavated, in bringing the material out, throwing it over to one side, there was a continual knocking down of the burn, the top of the hole, which of course tended to give extra slope to the sides.

Q. I'll ask you whether or not there was any complaint made to you about the holes not being ready, by the Concrete Construction Company, while you were there?      A. At what time?

Q. You were there while they were pouring, were you not?      A. I was.

(Testimony of Verne E. Ashley.)

Q. While they were placing concrete?

A. Right at the beginning of the placing of the concrete. [2051]

Q. You were there? A. I was there.

Q. And during that time was there any complaint made to you as to the type of the excavations?

A. No, not at that time.

Q. And was there any notice of any kind given you that the excavations were not adequate for the placing of the forms?

A. You're still speaking of the period when they were placing concrete?

Q. While they were placing it, yes.

A. No.

Q. I'll ask you whether or not there was any number of holes called for by Mr. Darcy upon you while you were there, number of structure excavations?

A. Well, yes, there were. In fact, when I called Mr. Schaefer he said, "Well, we've got to be sure that we have 50 structures ready to place, that we can place the forms in; we want to place 50 structures before we start our concrete pouring, or placing of concrete," and of course Mr. Darcy mentioned that, too, when he came on the job.

Q. Well, now, did you notice the progress of the placing of concrete after the equipment started operating? A. I did.

Q. By the way, what was the type of equipment that was being [2052] worked by the Concrete Construction Company while you were there?



(Testimony of Verne E. Ashley.)

A. Well, they were using—you mean for their concrete operation?

Q. Yes, sir. A. A Mixomobile.

Q. And at that time did it have a tower on it, or not; do you recall?

A. It had a tower on it during the time that I was there. They started removing the tower I believe the day or the day before, that I left the job.

Q. And did you observe their progress of pouring as to number of structures per day, or any basis? A. I did.

Q. What was the progress made from the commencement of pouring on or about July 31 to the time you left, on or about July 15—August 15, do you recall?

A. Well, I recall in reference to the placing of the 50 forms that their concrete placing began about the 1st of August. I left the 15th of August, and the 50th structure had been—concrete had been placed in the 50th structure at that time.

Q. Now, can you tell me whether or not during that interim period of approximately two weeks in there, there was any difficulty encountered by the Concrete Construction [2053] Company with respect to operating their equipment?

A. Yes, there was; they had considerable difficulty with the Mixomobile.

Q. And could you estimate the approximate portion of the time, of those two weeks, approximately, August 1 to August 15, the equipment was not operating in placing concrete?

(Testimony of Verne E. Ashley.)

A. Well, they were down considerable; I couldn't give the days, I don't recall the exact number of days.

Q. You can't tell me the number of days? All right, sir. Can you tell me whether or not there was an adequate carpenter crew on the job to construct panels for the placing of forms ahead of the pouring of concrete under the schedule of 50 structures in advance, as fixed by Mr. Schaefer?

A. Well, at the time that these operations were supposed to start, that was approximately July 5, I had called Mr. Schaefer around the 20th or 21st of June; there was no placing of concrete until approximately the first of August, which seemed like a long time for anyone that was anxious to get under way.

Mr. Olson: I ask that answer be stricken as not being remotely responsive to the question.

The Court: It will be stricken, the last part of the answer will be stricken, his observation "it seemed [2054] like a long time."

Mr. Holman: Yes, I don't object to that being stricken.

Witness: And I talked to Mr. Darcy about the number of carpenters and the number of forms that were being placed during that time, with the idea that that work should be speeded up.

Q. Well, what with respect to the adequacy, as to sufficient number of carpenters, in your opinion?

A. In my opinion there weren't enough at that time.

Mr. Holman: You may inquire.

(Testimony of Verne E. Ashley.)

Cross-Examination

By Mr. Olson:

Q. Mr. Ashley, when you came on the job on June 18, 1944, how many structure excavations were there then excavated?

A. Do you mean completed excavations?

Q. Yes.

A. Approximately 150; I didn't go out and count them.

Q. And by completed you mean what?

A. I mean fine graded.

Q. Were the curtain walls excavated in those 150 excavations?

A. In most cases.

Q. Did you check them to see that?

A. Well, those that we had occasion to check I did.

Q. Well, isn't it a fact, Mr. Ashley, that your men never excavated any curtain walls on any part of that job? [2055]

A. I don't remember anything like that.

Q. Pardon?

A. I don't recall that.

Q. How about the fillets, were they excavated?

A. Yes, they were.

Q. Isn't it also a fact that your men never excavated any of the fillets on this job?

A. Well, for what period of time are you speaking, now?

Q. I'm speaking right from the beginning of the first structure right through to the very last struc-

(Testimony of Verne E. Ashley.)

ture, and asking you with reference to the period of time that you were on the job.

A. To the best of my knowledge they were.

The Court: I know what the curtain walls, are, I think, but what are the fillets?

Mr. Olson: Well, the fillets, as I remember the testimony, your Honor, are these little sides on the corner here, 25-g, 25-e, and 25-f.

Q. (By Mr. Olson): How many of these 150 holes did you check, Mr. Ashley?

A. I don't recall the exact number that I checked.

Q. And what did you do to check them?

A. Measured them.

Q. What all did you measure?

A. Well, first of all, the alignment of the hole and the [2056] elevation of the hole. Of course, each structure had more than one elevation, that is, each hole consisted of maybe two or three structures, which would be of various elevations, and we checked those elevations.

Q. In other words, you checked it to see that the elevation was to the right elevation?

A. That is correct.

Q. And did you check the vertical walls against which concrete was to be poured, to see if they were in line?

A. I did.

Q. And you checked the curtain walls?

A. I did.

Q. Checked the fillets, did you?

A. Yes, sir.



(Testimony of Verne E. Ashley.)

Q. What did you have with you when you checked those?

A. Well, at the beginning of the job, while Mr. Staples was there, Mr. Staples and I did it, and later on in the job——

Q. I didn't say who, I said what did you have with you; did you have anything with you to check them?

A. Well, will you explain what you mean?

Q. Well, did you have any plans?

A. Surely.

Q. What did you have?

A. We had the detail plan sheets.

Q. All right, and how much time did you spend checking these [2057] 150?

A. Oh, I wouldn't be able to even guess at that.

Q. Spend 30 minutes? You think you spent that much time?

A. I wouldn't be able to guess.

Q. Couldn't say whether you spent that much time or not?

A. I spent sufficient time that I——

Q. I say, you couldn't say whether you spent that much time or not?

Mr. Holman: I think he has a right to answer the question.

Mr. Olson: He hasn't a right to give conclusions.

The Court: I think he can say how much time he spent, or that he doesn't know. I think that would answer the question.

A. I don't know.

(Testimony of Verne E. Ashley.)

Q. All right. Mr. Stickney followed immediately after you, did he not, Mr. Ashley?

A. That's right.

Q. And when you left there was about 50 structures that had concrete poured in them?

A. Approximately, yes.

Q. And by that term you're using "structures" advisedly, and you do not mean 50 different excavations; you mean 50 structures?

A. Correct. [2058]

Q. You don't know how many different excavations that was, do you?

A. No, I don't recall.

Q. And were there any more excavations that had forms in them when you left, other than these 50 that had been poured?

A. Oh, yes, there were; I wouldn't recall just how many forms were ahead at that time, but they were placing forms ahead.

Q. Is your memory clear enough, Mr. Ashley, on it to make any estimate at all?

A. No, it isn't.

Q. You don't remember that at all. Were you ever around the carpenters when they were putting in these forms?

A. Oh, at times, yes, I was around there.

Q. Would it be very often?

A. Not very often; I had our own work to do.

Q. Pardon?

A. I was busy on our own work; I didn't have too much time.

(Testimony of Verne E. Ashley.)

Q. You spent most of your time on up ahead?

A. That's correct.

Q. Would you say that you were around the carpenters as much as once or twice a week during the time you were there, when they were putting in forms?

A. Do you mean when they were placing forms?

Q. Yes.

A. Yes, I would say that it was once a week.

Q. You'd say that you were around the carpenters about once a week. Now, did you ever see them doing any digging?      A. No, I didn't.

Q. You never saw the carpenters do any digging; isn't it a fact, Mr. Ashley, that the carpenters, each one of them, spent from four to eight man hours on each excavation doing the fine grading?

A. I never saw it myself.

Q. Never saw it?      A. No.

Q. Never heard about it? You're shaking your head, no.      A. No.

Q. Isn't it a fact, Mr. Ashley, that shortly after you got on the job and on or about the 29th of July, that you told Mr. Darcy to keep track of the excavation labor and time that his carpenters had to put in on these excavations, and that Mr. Macri would pay for it, but to turn it in at digging time, and not carpenter time?

A. I don't recall any conversation to that effect. The only thing there, in that connection, as I stated before, was the fact that I did put a couple of men back there with him.

(Testimony of Verne E. Ashley.)

Q. Would you say that you did not tell Mr. Darcy that? [2060]

A. I said I do not recall such conversation.

Q. I understand you to say you did not recall it. Now I want to know if you say that you did not say that?

A. I couldn't say that I did or didn't.

Q. You just have no recollection of that?

A. I have no recollection on that.

Q. Now, you did receive complaints, I take it, from Mr. Darcy about the excavations not being to proper grade, and with reference to the slope, and with reference to the alignment?

A. Right at the first, when Mr. Darcy came on the job, that is correct.

Q. And those complaints continued as long as you were on the job, didn't they?

A. No, they did not.

Q. Pardon? A. No.

Q. Then you say you sent some fine graders back? A. Correct.

Q. Who was in charge of the fine grading under you? A. A man by the name of Sheffield.

Q. Curtis Sheffield? A. Correct.

Q. And was he on there all the time that you were there?

A. Well, not all the time. He left previous to the time that [2061] I left.

Q. Well, he left just a few days after you came on, didn't he, Mr. Ashley?



(Testimony of Verne E. Ashley.)

A. No, he was there; I don't recall the date that he left, but it was probably around the first of August.

Q. Well, now, were you able to get anybody else to take charge of the fine grading after he left and up to the time you left? A. No, I was not.

Q. Pardon? A. No.

Q. So that from August 1 to August 15, then, you had no one in charge of fine grading?

A. During that particular period there was some repair work made on the hoe that was rented from Mr. Mullins, and I stayed out with the fine grade crew as much as possible and looked after that.

Q. During the time that you were there was the pipe laying going on, too?

A. Yes, the pipe laying was started just previous to the time that I left there.

Q. Was that being done by Macri and Company, or being sub-contracted?

A. That was being done by Macri and Company.

Q. By Macri and Company; and would the men that were doing [2062] that work be classified as laborers on your payroll? A. No.

Q. Pardon? A. No.

Q. Now, I hand you Macri's identification 15, Mr. Ashley, for the week ending June 28; now, that was the first week, I believe, that you were there, or approximately so? A. Approximately.

Q. Now, how many laborers do you show on the payroll there, altogether, for that week?

A. Five laborers.

(Testimony of Verne E. Ashley.)

Q. And do you show any pipe layers in addition to the five laborers? A. No.

Q. Do you show any fine graders in addition to those five laborers? A. No.

Q. Is it not a fact, then, Mr. Ashley, that those five laborers constituted both your fine grading crew and your pipe laying crew?

A. There was no pipe being laid at that time.

Q. I understood you to say that the pipe laying started before you came?

A. I said the pipe laying started just previous to the time I left the job. [2063]

Q. I misunderstood you. How long before you left did the pipe laying start?

A. I wouldn't be able to give you the exact date.

Q. Well, did it start two weeks before you left?

A. Should probably be shown there in the latter part of July; I'd say the last week in July.

Q. Now, how many—or just how did you work your fine grading crew, Mr. Ashley? Did you have them all working together, or did you have two sets of them?

A. That depended, of course, upon the number of men that we had on the job. It wasn't possible to work over two or three in a structure at one time. If there were five men, why, we'd be working in two or three structures.

Q. Well, did you have five men, any time, fine grading? I'll hand you your payroll.

(Testimony of Verne E. Ashley.)

A. Well, we just counted the laborers on that payroll, and that would be the only type of work they were doing at that time. That would be the best answer I could give you.

Q. Well, you counted four there——

A. I believe we counted five, the day that you showed me.

Q. Would you take a look at the week ending July 19, Mr. Ashley; that's the week ending July 19, July 13 to July 19; how many laborers do you show on that?      A. On the date of July 19? [2064]

Q. No, the week ending that; for the whole week.

A. Four laborers.

Q. Four; and how many hours did they put in that week?      A. Total?

Q. Yes.      A. 88.

Q. So that that would be the equivalent of approximately two men working continuously for the week, then, wouldn't it?      A. 40 hours a week.

Q. Two men and one day; so that assuming that they were all fine graders, your crew, fine grading crew, didn't stay around five men, did it?

A. No.

Q. Now, it's also a fact, is it not, Mr. Ashley, that you wouldn't have the same men from day to day doing this fine grading work?

A. Yes, they were pretty much the same personnel.

Q. Isn't it a fact that you had a large turn-over there on the men doing your fine grading?

A. No, not too much. There were about four or five men there that were on.

(Testimony of Verne E. Ashley.)

Q. And isn't it also a fact that Mr. Macri wouldn't, just didn't permit you to pay the wages to enable you to get the proper type of men that understood fine grading? [2065]

A. Well, you better explain that statement a little more.

Q. Well, didn't Mr. Macri tell you to keep the payroll down, not to pay too much money, and as a result of that, you were unable to get the right type of men to do your work?

A. Well, the pay was governed by the scale.

Q. Well, didn't Mr. Macri tell you that?

A. Would you just state exactly what you wanted?

The Court: Read the question.

(Whereupon, the reporter read the question beginning with the words "Well, didn't Mr. Macri tell you to keep the payroll down.")

A. I didn't have any conversation with Mr. Macri regarding the number of men or the amount to be paid.

Q. Now, you say when the Concrete Construction Company came back on the job after you called them and said you had enough structures ahead to go to work, that they came back with a crew of ten men?

A. It was approximately that. I don't remember the exact number.

Q. If the Schaefer payroll showed a different amount of men, you wouldn't say that their payroll was incorrect?



(Testimony of Verne E. Ashley.)

A. I would say that the payroll reflected the true number of men on the job.

Q. In other words, your figures in that regard are purely estimating, looking back over approximately, well, close [2066] to three years now?

A. That is correct.

Q. And how many of his men were carpenters is likewise purely an estimate? A. It is.

Q. Now, after the crew came back you say they did complain about the excavations being not right, and that you went back and found about a half a dozen of them wrong? A. That's correct.

Q. How do you fix it at that half a dozen? Is that again——

A. Well, that's again an estimate.

Q. You kept no track of the number that were found wrong? A. I have no record here.

Q. And you have no record of the number that the Concrete Construction Company carpenters themselves hand excavated to grade, have you?

A. I have no knowledge that they were——

Mr. Holman: Just a minute. Your Honor, I object to the question as based upon counsel's assumption that there were any. In other words, if he adds "if any," that's different, but I don't want the witness to admit in his answer that they did any.

The Court: Well, the question might be objectionable on that ground, unless it is implied "if any," in the question. [2067]

Mr. Olson: Of course, there's been plenty of testimony that there were.

(Testimony of Verne E. Ashley.)

Mr. Holman: A lot of testimony that there weren't, too, your Honor.

Mr. Olson: I haven't heard it.

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Ashley, what did you find about these half dozen or so that you went back—what did you find about them that was wrong?

A. Well, the main thing was the elevation.

Q. They were not to proper grade?

A. Were not to proper grade.

Q. How about the lateral clearance, were they excavated out from the foundation a foot out from the neat line of the concrete?

A. Oh, possibly that may have been one of the items that was wrong.

Q. Pardon?

A. That possibly could have been one of the items wrong in the ones we found that had to be corrected.

Q. Now, how about the banks? Did they slope to a one to one slope?

A. Your question is so general it would be pretty difficult to answer.

Q. I'm asking about the banks, the outside banks opposite [2068] that part of the structure where an intervening form would be placed between the concrete and the bank.

A. I understand that.

(Testimony of Verne E. Ashley.)

Q. Now, that bank, was it sloped to a one to one slope?

A. Are you referring to all structures, are you referring to one structure, or just what is your question?

Q. I'm referring to the ones that you examined.

A. You refer to the ones of this half dozen I mentioned that we had to correct?

Q. Yes, those or any of the others.

A. Far as a one to one slope is concerned, I wouldn't be able to make a statement that they were to a one to one slope or that they weren't; in other words, we had no intention or didn't pay any attention to this matter of going to a one to one slope; that's why I asked you to repeat the question. I didn't understand just what you——

Q. In other words, you never heard of this one to one slope?

A. I've heard of the one to one slope, yes, but when you're talking about excavating the structures, in the actual excavation, we weren't instructed, our specifications didn't call for a one to one slope.

Mr. Olson: I ask that that be stricken.

Mr. Holman: Oh, I submit it is responsive.

The Court: As to what the specifications called for, will be stricken. [2069]

Q. (By Mr. Olson): You made no effort to excavate the banks to a one to one slope?

A. That's correct.

Q. Did you have anything to do with staking out any of the structure excavations for excavation by the hoe?

A. I did.

(Testimony of Verne E. Ashley.)

Q. And how much lateral clearance did you stake out?

A. Well, we figured, that is, in placing the stakes and instructions to the operators, to allow a foot at the base of the structure, and then side slope, I'm speaking of the two sides, not the ends that the hoe operated in, because the hoe itself took care of that.

Mr. Olson: I ask that all be stricken. I asked what he staked out. I didn't ask about the instructions, or what the hoe knocked off.

The Court: I'll permit it to stand. He's explaining why he staked a certain way.

Q. (By Mr. Olson): Now, answer my question, Mr. Ashley. How did you stake them out? Where did you place the stakes with reference to the structures?

A. I placed the stakes a foot out from the corners of the structures.

Q. Yes; in other words, when you went out and staked, you staked the excavations, that is, the sides of the excavations, you placed the stakes on the surface of the ground [2070] one foot from the neat line of the concrete?

A. Neat line, that's correct.

Q. And isn't it a fact, Mr. Ashley, that after these excavations were made by the hoe in a good many instances those stakes were still standing there on the ground?

A. Not at the point they were placed when the structure was staked out.



(Testimony of Verne E. Ashley.)

Q. Somebody moved them?

A. That is correct. That was the oiler's job, to offset them, because he knew how many feet he was offsetting them.

Q. The stakes were still sticking in the ground?

A. They were still sticking in the ground, but not in the place they had originally been placed.

Q. Now, you say Mr. Darcy never did give you a list of the total amount of lumber needed to finish the job?

A. Not a list marked or indicated as a total for the complete job.

Q. He gave you numerous orders for lumber, though?

A. He gave me verbal, several instances during the month of July, for just two by fours and such, which were immediately filled. He gave me one, as I recall, one written order which covered this stilling pool and chute.

Q. That was in July?

A. That was the latter part of July or the first of August. [2071]

Q. And he urged you to get that stilling pool lumber then?

A. He wanted to place an order because lumber was difficult to get at that time.

Q. And he told you he wanted the lumber?

A. Surely.

Q. Pardon?

A. Yes, sir.

(Testimony of Verne E. Ashley.)

Q. Now, there was orders for lumber at the yard all the time, were there not, by Mr. Darcy and the Concrete Construction Company?

A. Written orders?

Q. Well, there were standing written and verbal orders? A. No.

Q. How many times did you run out of two by fours while you were there?

A. I didn't recall that we ran out of two by fours. I recall specifically one instance where Mr. Darcy said they would be out by noon if we didn't have them on the job. I went down, or I sent down, to the retail yard and picked them up.

Q. Do you recall any instances where the yard was completely out of any type of lumber?

A. No, I don't recall that.

Q. Would you say that that was not a fact, that they were completely out of some type of lumber? While you were [2072] there, that is?

A. I don't recall that they were completely out of any type of lumber at any time while I was there.

Q. Couldn't say they were or not?

A. The only answer I could give to that is to say I do not recall.

Q. Do you have the list of lumber that Mr. Darcy gave you—any of them?

A. There's one list as a matter of record. That is the only written list that I had from Mr. Darcy.

Q. This list that Mr. Holman showed you, that was a list that you made up and sent in to Mr. Macri, was it not?

(Testimony of Verne E. Ashley.)

A. That list was given to me by Mr. Darcy. That covered the materials in the stilling pool and chute. He gave it to me on a piece of paper. I typed it off on a memo sheet and sent it in to the office.

Q. In other words, the document that was shown you in Court is not the one that Mr. Darcy typed up? Your answer is no? A. No.

Q. It's one that you typed up?

A. That is correct.

Q. Now, you say that there was no complaints made to you about the excavations while they were pouring concrete. Now, by that you mean that the concrete crew made no [2073] complaints to you, is that what you mean?

A. I mean during that period of time.

Q. Well, you seemed to make some point when Mr. Holman was questioning you about it, whether he was confining it to that period of time, Mr. Ashley, and I just wanted to inquire what you meant by it. A. I meant during that period of time.

Q. What period of time was that?

A. From the latter part of July to the middle of August.

Q. So during that two week period you don't recall anybody complaining to you about the excavations? A. No, I don't recall any.

Q. The complaints had all come in prior to that time?

A. The complaints on the excavations were made within the first two weeks that the Concrete Construction Company came back on the job.

(Testimony of Verne E. Ashley.)

Q. Well, you didn't see the Concrete Construction Company crew much after that, did you, Mr. Ashley?

A. What do you mean by crew?

Q. Well, any of the men, or Mr. Darcy?

A. Oh, every day we'd see each other.

Q. Now, you say that the Concrete Construction Company equipment was down considerable. What do you mean by that?

A. Well, it wasn't producing, or in the active placing of concrete. [2074]

Q. So by the use of that word you mean that it was not in operation?

A. It was not in operation, that's correct.

Mr. Olson: That's all.

### Redirect Examination

By Mr. Holman:

Q. When counsel asked you with respect to one to one slope, what in practice is the function of a one to one slope on this job?

A. The function of a one to one slope, or that is, a reference to a one to one slope, is simply to limit the pay quantity as far as the owner is concerned. It has no reference to a direction or specification as to what has to be done. It just simply relates to the liability of the owner.

Mr. Olson: Now, your Honor please, I ask that that be stricken. It certainly is not responsive to the question. It is obvious that's not the function of a one to one slope, to limit the pay quantity.



(Testimony of Verne E. Ashley.)

The Court: Well, it isn't strictly responsive, perhaps, but I think as an expert engineer he may express an opinion.

Q. (By Mr. Holman): That's what I'm asking, as the function of a one to one slope. Now, at any time that you were on that work did you receive any directions of any nature from the Bureau of Reclamation to cut the banks for concrete [2075] structures at any fixed slope?

A. I did not.

Q. And what was the character of the soil with respect to its ability to stand? Do you remember the character of the soil?

A. Well, the soil in my estimation would probably be classified as an A-4 soil, which is silt, and under certain conditions it will stand on a vertical slope. It requires considerable moisture to make it stand on that slope. It may, if moisture conditions are just right, on a new cut it may stand that way for a short time, until it's been exposed to the sun, and then it will cave off.

Q. Have you at my request recently inspected the site, Mr. Ashley?      A. Yes, I have.

Q. And at that time were you able to see any newly disturbed soil? Did you see any soil disturbance?      A. Oh, in plowed fields.

Q. You did. Counsel asked you as to an instruction by Mr. Macri as to limit of men. Will you tell me whether or not you had any limitation as to the number or the type of men you employed while you were there?

(Testimony of Verne E. Ashley.)

A. No, Macri did not place any restriction as far as I was concerned. [2076]

Q. Now, did you have any limitation as to the purchasing of lumber?

A. The only limitation that I know of was the availability of it.

Q. But I mean, so far as instructions of Mr. Macri is concerned, was any limit placed?

A. No.

Q. Did you have any positive instructions with respect to purchasing lumber?

A. There was a conversation with Mr. Macri regarding lumber, that I told him that we could go down to the retail yard and get a small quantity, but that's all that was available down there, and he said that if and when we got a completed list of lumber, to forward it in to the Seattle office.

Q. Were you given any authority to purchase locally, at all?

A. I assumed that authority, as superintendent of the job.

Q. Yes, sir; and will you tell me whether or not you had any limitation placed on you as to running the job, while you were there? A. I did not.

Q. Counsel asked you as to pipe. Referring you to Exhibit 70, Mr. Ashley, which has been testified as being a metal plug, can you tell me whether or not they used this while you were there, this type of plug? [2077] A. No.

Q. What was done with respect to the plugging for pipe in the building of forms?

A. They made up a wood plug.

(Testimony of Verne E. Ashley.)

Q. Well, will you explain to the Court what is the function of a plug, and its due relationship to the pipe?

A. Well, the concrete operation, that is, placing of concrete in the structure, and the pipe laying necessarily has to be co-ordinated to a certain extent, and it was getting late along in the job, and it was apparent that we were going to have to start the pipe laying previous to the—that is, it would catch up and pass the placing of concrete in the concrete structures; well, inasmuch as the structure was not in, of course, why, the pipe could not be put in the structure.

Mr. Olson: Your Honor, I think I don't mind this man assuming a little bit, but once he starts in he keeps on going about what was around and what was going to happen.

Mr. Holman: I have no objection to counsel objecting to some question, but I certainly object to his endeavoring to discipline the witness.

The Court: Well, he's complaining about it, I assume. The answer wasn't entirely responsive. You can interrogate him if you wish. [2079]

Q. (By Mr. Holman): Let's take this 26——

Mr. Olson: I object to this as not being proper redirect.

The Court: It isn't proper redirect. If you wish to re-open your direct, you may do so, but the mere mention of pipe in the cross does not make it proper. I think we may as well recess for five minutes, if this is going on for some time.

(Short recess.)

(Testimony of Verne E. Ashley.)

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, I decided not to go into the pipe question.

The Court: Oh, all right.

Mr. Holman: That's all, your Honor.

Mr. Olson: I have a couple of questions, unless counsel is going to examine.

Mr. Hawkins: I have no questions.

The Court: I might say when you have a witness here like this witness, and have something you overlooked, and wish to re-open direct, I have no objection to that.

Mr. Holman: I understand that.

The Court: I'm not trying to cut you off.

Mr. Holman: No; it's a collateral issue. [2079]

### Recross-Examination

By Mr. Olson:

Q. Do you remember talking to Mr. Matt Schaefer and Mr. Darcy in Coeur d'Alene, Idaho, on or about October 26, 1946? A. Approximately.

Mr. Holman: Just a minute. Objected to as not proper cross-examination. If it is for the purpose of impeaching the witness, I have no objection, but otherwise it is not proper cross.

The Court: It is not proper cross, but——

Witness: I recall that.

Q. I will ask you if you did not in the course of that conversation state to Mr. Schaefer and Mr.



(Testimony of Verne E. Ashley.)

Darcy in substance as follows: That you had requested Mr. Staples to stay on the job, because it was a two man job, and that you'd both run it, and Mr. Staples said it was all right if you could put it over with Mr. Macri, and that Mr. Macri had then called you later and wanted to know why Mr. Staples was still on the payroll, and that you said because you had not learned all you needed to learn about the job to be able to run it alone, and needed Staples, and Mr. Macri said to you "You better learn quick, because Staples has to get off the job." Did you say that?           A. I did not say that.

Q. Did you not say this in substance: That you could have [2080] obtained plenty of skilled men for all the work, but that Macri would not pay the wages?           A. I did not say that.

Q. I'll ask you further if you did not at the same time, to Mr. Darcy and Mr. Schaefer, say in substance that your blow-up with Macri came because of Macri refusing to pay enough for good help, lack of lumber, no effort to send any in, and Mr. Macri forcing the laying off of help, the lack of adequate equipment, and the refusal of Mr. Macri to supply any more; you did not say that?           A. Not those words.

Q. Or in substance?           A. Or in substance.

Mr. Olson: That's all.

#### Redirect Examination

By Mr. Holman:

Q. Did Mr. Darcy and Mr. Schaefer solicit a statement from you, signed, at that time, Mr. Ashley?           A. They did.

(Testimony of Verne E. Ashley.)

Q. And what did you tell them?

A. I told them that first of all I was very busy and I didn't want to take any more time than possible, and also the fact that practically three years had elapsed, there was a lot of things that I didn't recall, and that I couldn't sit down and give anybody a statement right at that time, off-hand, so the meeting or the visit was [2081] concluded by Mr. Schaefer asking me if I saw fit, after thinking it over and going over what information I could recall, if I could give him a statement, if I would, and I said I would if I thought that I could give him a statement that would in any way help him or do anything for him.

Q. And you answered counsel as to this last question, he asked you, you did not say that in substance, or not those words. What did you say? Do you recall the substance of what you said?

A. Well, he's covered quite a series of conversation there. For instance, there was mention made about the fact that if Staples desired to stay on the job, that was perfectly all *right me*, and I thought it would work out very nicely because at that time I supposed we were going to be able to get the other hoe going immediately, and a pipelaying crew; there would have been sufficient work for the two of us; Mr. Staples complained of having been sick, and figured that it was the dust was getting the best of him out there, and he wanted to leave.

Q. Did you tell them that?

(Testimony of Verne E. Ashley.)

A. That was the substance of our conversation regarding Staples.

Q. What else did you tell them, if you remember?  
A. That is about the only statement.

Q. Counsel used the words "blow-up with Macri"; did you have any statement as to that?

A. I don't recall any statement to that effect, because there was never any blow-up. Maybe I don't know what the term you're referring to there means.

Mr. Holman: That's all.

Mr. Olson: That's all.

The Court: All right, you may be excused, then.

(Whereupon, there being no further questions, the witness was excused.)

### TOLLIFF HANCE

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Will you please state your name and place of residence?

A. Tolliff Hance, and my residence is in Spokane.

Q. And have you had experience with the Bureau of Reclamation work?

A. I worked for the Bureau of Reclamation for about five years.

(Testimony of Tolliff Hance.)

Q. Will you state your qualifications, Mr. Hance, please?

A. Well, I have received a degree in electrical engineering in 1932, one in civil engineering in 1936, and during the intervening years between those two degrees I worked about a year and a half on surveying crews, and then in 1936, after I graduated, I went right from school to the [2083] Riverton Project of the Bureau of Reclamation in the Denver office, and down in the Tucumcari Project in New Mexico until July, 1941; then in 1941 I went to Cleveland to work for a consulting firm. I was there about a year and a half, and then I taught at Kansas State College in Manhattan, Kansas, for about a year and a half.

Q. What did you teach?

A. Teaching engineering subjects, basic engineering subjects and also some mathematics. Then I left Kansas State College in July of 1944, worked with Ryan Aircraft Company for about two years as a structure analyst, and I left Ryan in June, 1946, and came to Spokane. At present I have my own office in Spokane as a consulting engineer. I have been operating that now for about five months.

Q. How long, then, Mr. Hance, were you with the Bureau of Reclamation?

A. Well, that would be total time of about five years. I moved around somewhat in the Bureau, transferred to various departments.

Q. I'll ask you if at my direction you have inspected recently the site of 1062, schedule 1?



(Testimony of Tolliff Hance.)

A. Yes, on March 11, in the afternoon, I took a trip out on the project and generally looked over the project, made [2084] specific examination of several structures, and, oh, generally looked the type of structures over; I got out and actually measured up a few of them particularly. I looked at the type of structure and the soil conditions and so forth.

Q. And did you have an opportunity in that time to observe the character of the soil through which the excavations had been made?

A. Well, at least the——

Q. I say, did you, sir?

A. Yes, a portion of it.

Q. And will you tell me whether or not you had occasion to observe that soil in natural condition and that soil disturbed?      A. Yes.

Q. How did you do that?

A. On the project there are several plowed fields, and that's a good instance of the disturbed soil, down to depth of about a foot, and then along the canal banks where the rain, apparently, or the water had washed away, the bank would be exposed for a depth of maybe a foot and a half or two feet in a few places.

Q. What is the type of soil around there, Mr. Hance?

A. Well, it is a silt. In fact, it's almost entirely silt. It is apparently a Loess glacial deposit. It contains [2085] very little clay and very little coarse material, at least the stuff I saw on the surface.

(Testimony of Tolliff Hance.)

Q. And do you know about its normal, its natural, angle of repose?

A. Well, glacial deposits don't have a definite angle of repose. In fact, definite angle of repose is only true of sand. In fact, other types of materials, they'll stand vertically a short distance, and then tend to cave off, depending upon the peculiar conditions of the moisture content of the soil and so forth.

Q. What is this general classification of soil?

A. Well, this is glacial deposit; it would tend to stand on short vertical slopes, that is, not very high, maybe a foot, foot and a half. Now, that's not a true vertical plane; that is, it doesn't—when freshly excavated, it would probably stand for a foot or a foot and a half, reasonable moisture content, on a practically vertical slope. On a dried condition or a disturbed condition it wouldn't stand on a vertical slope. I don't know exactly what the slope would be, but it would have to slope back some.

Q. Now, I'll ask you whether or not in your experience with the Bureau of Reclamation you had occasion to learn of the provisions of specification 47 in the specifications 1062, schedule 1. Did you at my request study these [2086] specifications which are shown by plaintiff's Exhibit 3, Mr. Hance?

A. Yes, sir, I read them over and studied some paragraphs in detail.

(Testimony of Tolliff Hance.)

Q. Will you turn to specification 47, and tell me whether or not that is a usual or unusual specification in Bureau——

A. You mean paragraph 47?

Q. Yes——

Mr. Olson: Now, your Honor, I don't see the materiality of whether or not paragraph 47 is a usual or unusual paragraph to be contained in specifications. It is there, and may be the only one that was ever issued by the Bureau, or might be the same one that's issued in every one. It has no materiality, as far as this case is concerned.

The Court: I suppose it is leading up to his interpretation of it. I'll overrule the objection.

Witness: Well, this particular paragraph is generally pretty common throughout all Bureau specifications that I've ever examined, particularly on lateral structures on distribution systems.

Q. Now, in your experience with the Bureau did you have occasion to estimate quantities of performance, to fix pay quantities? [2087]

A. Yes, the time you set up any job in the Bureau of Reclamation it's usually up to the field office to make an estimate of cost for the purpose of soliciting funds, and while we make recommendations on specific items, the Denver office then works out the details from our recommendations, and a great many of their paragraphs are pretty much standard, such as this one.

Q. And with respect to the portion of that specification providing for slopes one to one, will

(Testimony of Tolliff Hance.)

you tell the Court what is the practical use of that from the Bureau standpoint, for payment?

Mr. Olson: That's objected, your Honor; the specifications speak for themselves as to their contents.

The Court: Overruled.

A. The excavation slopes here in the specifications state that for purpose of payment it will be one to one for common excavation and one quarter to one for rock. In this type of specification where the contractor is expected to bid unit prices per yard for structure excavation, there must be some means of determining how much structure excavation there's going to be, in order to prepare bids, and also it limits the liability of the owner as to what he shall be obliged to pay for structure excavation. The actual slopes in here are put in for that purpose. [2088]

Q. And I'll ask you whether or not that has any applicability to the item of back fill?

A. Item of what?

Q. Back fill.           A. Yes.

Q. How does that apply?

A. The amount of back fill is defined as excavation refill, which would be the amount of excavation outside of the structural lines, that had to be back-filled with material, and this would also limit the amount of back fill that the owner would be obliged to pay for, or in this case, the Bureau of Reclamation, under the item of back fill about structures.



(Testimony of Tolliff Hance.)

Q. Now, have you had occasion, Mr. Hance, to observe field performance for installation of reclamation projects such as this specification 1062, schedule 1, in your practice?

A. Yes, we've had, from the time I worked with the Bureau on the Riverton Project we had three contracts for lateral systems, and on the Tucumcari Project in New Mexico we put in some lateral structures with the W.P.A. forces.

Q. Did you at my request determine what would be the appropriate quantity of lumber required to service the pouring, the placing, of concrete in the structures on this job? [2089]

A. Yes, I made a rather—well, I made an estimate, rather a short estimate, based upon a few difficult structures. I did not go through all the structures, no.

Q. Were you able from that estimate to fix a maximum quantity of lumber that would be required for this performance?

A. Well, I was able to make an estimated quantity of the amount of lumber for the amount of concrete given in here, and as my estimate, estimating is not exact, from that I estimated 60 or 70 thousand.

Q. You determined a figure, did you?

A. Yes.

Q. What was your figure?

The Court: Just a minute, the witness hadn't finished his answer yet.

Q. I wanted to make it responsive, your Honor.

(Testimony of Tolliff Hance.)

The Court: All right, go ahead.

A. About 70,000 board feet.

Q. And how did you arrive at that, Mr. Hance?

A. Well, there are some, I believe the specifications called for about 1500 yards of concrete, that's item 12, about 1500 yards of concrete, and from examination of a few typical structures I estimated the square feet of form required to build those structures, and it takes about two and a quarter board feet of lumber to form one [2080] square foot one time, and then a reasonable re-use of forms I took to be about five times.

Q. What from your experience is a reasonable re-use of form panels?

A. Well, they can be re-used from, oh, from three to perhaps fifty times, depending upon the type of panel and the care with which it is made and how it is handled and so forth. Ordinarily on structures of this type, why, six to twelve times has been common practice as I've observed it. Where they're lined with plywood you can use forms a good many times, that is, by that, twelve or more times. Where they're not lined with plywood, why, three to six times, and then they have to be repaired. In repairing frequently all that is necessary to do is rip off the sheathing and replace it. It is not necessary to rebuild the entire form. I recently had a brochure from Universal Form Tie Company in which they put out a form which they claim can be used from fifty to 100 times.

(Testimony of Tolliff Hance.)

Q. Now, handing you what has been introduced in evidence as exhibit 44, are you familiar with that type of fastening? A. Yes, sir.

Q. And have you at my request inspected it, Mr. Hance?

A. Yes, I looked at it the other morning.

Q. Will you explain to the court, will you tell me first what this is known as—— [2091]

A. Well, it is a——

Q. I didn't finish my sentence—in form work?

A. It is used as a combination tie and spreader in concrete forms. It ties the forms together, and at the same time holds them the correct distance apart.

Q. Is it or is it not known as a she-bolt?

A. I've never heard that called a she-bolt.

Q. What is a she-bolt?

A. Well, a she-bolt is a bolt with one male and one female end, and one end has a thread which a nut can be screwed on, and the other end is hollow, and has a stud or thread which a bolt can be screwed into.

Q. Now, assuming that this 44 had been placed to hold a form near the base of a structure, can you demonstrate from this 44 the distance to which the outer portion of 44 would have to be extended in order to release that panel of the form?

A. Well, the form, the inside sheathing of the form, is butted against this face of the cone——

Q. Now, just a moment; could I have that marked 44, another sub-number?

(Testimony of Tolliff Hance.)

(Whereupon, a portion of Exhibit 44 was marked 44-b.)

Mr. Olson: Your Honor, it seems to me it is taking a lot of time to establish that thing. It is a matter [2092] of mathematical figuring out how far you've got to unscrew that bolt. It doesn't take a civil engineer to figure that out. I consider it wholly immaterial.

Mr. Holman: If counsel wants to make an objection——

The Court: Well, I'll consider it an objection to proceeding with this line of inquiry.

Q. (By Mr. Holman): Now, referring to the portion here which the clerk has marked 44-b, what is done with respect to that, will you show the Court?

A. Well, this is held in the concrete. After the concrete is poured, in order to remove the form you turn this rod here——

The Court: It isn't necessary to separately number all those parts.

A. ——the tail rod, you twist that you; you will have to hold this for me, and you unscrew that to the distance of its embedment in the cone nut, which would be about half way or probably one and a half inches. As soon as the tail rod comes out where it clears the form rod, then the cone may be removed.

Q. And what with respect to the other side?

A. Well, the same way, and also as soon as this tail rod is removed to the depth of its embedment,



(Testimony of Tolliff Hance.)

why, the form may be removed. The two cone nuts and the rod in between stay in the concrete. [2093]

Q. Now, would this be moved clear out?

A. No, just till it clears this cone nut. It would be a matter of unscrewing this maybe an inch or an inch and a half; slide it out until it just clears that. That embedment there was about an inch, in this case.

Q. Now, is that the total distance needed for operation of the arm marked 44-a, in removing a form, or not? A. Yes.

Q. I'll ask you whether or not you made any investigation under my direction as to the type of equipment used on this job, and its adaptability for performance of this job?

A. Well, I didn't actually see the equipment. I saw the pictures in the book that you showed me.

Q. And referring to 49-1 and 49-2 in plaintiff's Exhibit 49, with respect to the concrete placing equipment, that's what I'm asking you about.

A. Yes, the mixer here is the large mixer, that's 49-1, and 49-2 is a mobile buggy which transports a small portion of the batch to the form.

Q. Have you had occasion in your experience to see equipment in operation? A. Oh, yes.

Q. Will you state whether or not that equipment is practical equipment for the performance of this job? [2094] A. In my opinion is it not.

Q. Why?

A. It was too large and heavy for the amount of concrete involved in this particular job. If you

(Testimony of Tolliff Hance.)

have a mixer there, about a yard mixer, under proper operating conditions, that should work at an output rate of 15 to 30 cubic yards an hour, and with only 1500 yards involved, that would be a total of about 50 yards to 100 *yards* (hours) use, total use of the equipment on the job, and meanwhile, that is, if you either have to set up a job to use that equipment in from two to three weeks, and then get it off the job, or you have to have a lot of idle time for that equipment, and it's not practical to set up a job if your pour is so short, because it takes a large crew and it is hard to build up a large crew in that short period. Over a long period the cost of maintaining a large mixer, which is naturally relatively expensive on the job, would be more than the job would be worth.

Q. Now, it has been established here, Mr. Hance, that the elevator shown in 49-1 was later removed, and that pouring was done from the mixer as shown in 49-35 and 49-36. Would that change your answer?

A. Well, no, the fact that they've taken the tower off, you've still got a heavy, expensive piece of equipment [2095] for only 1500 yards of concrete.

Q. Will you tell me whether or not in the inspection you made in the field under my direction you found any evidences of Bureau tolerance with respect to completion of concrete structures?

A. Well, I measured several structures, and I found that wall thickness, as comparison with the

(Testimony of Tolliff Hance.)

plan, varied from a quarter of an inch less than that called for in the plan to three eighth inches more than required on the plan, rather frequently, and in one instance I measured one wall that was half an inch wider than the plan called for.

Q. Did you make any memo of the structures that you examined, Mr. Hance?

A. Yes, sir. Yes, I actually measured about 11 or 12 structures.

Q. Would you call those off, please?

A. They're the structures on lateral 59.3-A. I examined structures 33, 34, and 35 on 59.3; structures 36 and 37 on lateral 59.8; structures 43, 44 and 45, and on lateral 59.9, 47 and 48, and then I also examined the chute structure on the east turbine lateral.

Q. Would you give me the structures on 59.9 again, please?

A. 47 and 48.

Q. And what was the last? [2096]

A. The chute structure on the east turbine lateral. We looked at several others, but I didn't make a detailed examination, and therefore did not——

Q. By the way, when did you make the examination?

A. That was March 11, in the afternoon.

Q. And who was with you?

A. Mr. Ashley and Mr. Staples.

Q. Now, can you tell me whether or not in examining those structures you found any evidence

(Testimony of Tolliff Hance.)

of any forced prying of the panels from the form—form from the concrete structure?

A. Well, the concrete wasn't scored.

Q. It was what?

A. I say, the concrete was not scored; there was only one chip that we noticed on any structure. That was on the east turbine lateral, and that apparently had been done sometime after the concrete had been poured, because the concrete showed evidence of having been fairly set before that was knocked off. That may have been back fill operations.

Q. Can you tell me whether or not what you observed from these structures constitutes in field practice of the Bureau what is known as reasonable tolerance?

A. Well, the tolerance in the field is up to the individual inspector, and if this project was satisfactory, they [2097] accepted the structure, I would assume that they used a quarter to three-eighth inches as being satisfactory. There is no strict tolerance set up. It is up to the judgment of the individual inspector on the job.

Q. Is there a field tolerance recognized in inspection, or not?

A. Well, just what the—tolerances will vary a little bit with the particular type structure. On elevations in ditches where you're going to put the structure, the absolute elevation of the structure, if it is within a tenth it is probably close enough. The thickness of the walls in those structures would



(Testimony of Tolliff Hance.)

be held to much closer tolerance. A quarter of an inch in the walls the size of this structure would probably be considered adequate.

Q. Now, from the inspection in the field, can you tell me whether or not the type of structure called for performance here is unusual, or the usual type used in the Bureau of Reclamation for conveying of water for irrigation purposes?

A. In general, the type of structure is fairly common. At the time I worked with the Bureau our structures differed a little in detail from these, inasmuch as at that time we re-enforced every structure, and we used thinner walls than they did out here, but generally speaking the weir box is about the same shape, and [2098] culvert head walls and so forth.

Q. Did you at my request, Mr. Hance, determine a percentage of the various sizes of structures which are involved in the performance of specification 1062, schedule 1?

A. Yes, I went through 368 different structures, and determined the height from the invert elevation to the top of the head wall, and classified those into five groups.

Q. Do you have a tabulation of those?

A. Yes.

Q. Will you indicate to the Court what you did, and what you found?

A. Yes. I listed the structures by number, and through the plans that I had available I determined the height as I described; there were a few

(Testimony of Tolliff Hance.)

structures that were missing, and some were duplicated, but the duplication wasn't counted.

Q. How many did you total?

A. I got a total of 368, and I classified those as to the wall height, that's the interior wall height from the invert to the head wall.

Q. The invert means what?

A. The invert elevation is the top of the concrete slab, and the head wall, the elevation of the top of the head wall as applied to that particular structure. [2099]

Q. All right, sir.

A. First classification were those with a head wall height of one and a half feet to two and a half feet, and of the 368 structures I found 23, or 6.2 per cent, were in that class. In the two and a half feet to three and a half feet height, I found 152 structures, or 41.4 per cent; three and a half to four and a half, 101 structures, 27.5 per cent; four and a half to five and a half feet, there were 54 structures, or 14.6 per cent, and all structures that were greater than five and a half feet, there were 38, which totaled 10.3 per cent.

Q. Now, what over-all percentage of the structures you have just indicated would be accessible from the top of the structure for the purpose of removing the fastener shown by exhibit 44, at the base or near the base?

A. You mean on the outside wall?

Q. Yes, the outside.

(Testimony of Tolliff Hance.)

A. Well, it would a function of the cut, and since these structures usually stick up above the ground a foot to a foot and a half, it would make about 74 per cent that would have a wall height of less than four and a half feet, and therefore a depth of excavation of not in excess of probably three and a half.

Q. Mr. Hance, did you at my request compute what would be the cost of performing all of the excavations for specifications [2100] 1062, schedule 1, entirely by hand?

A. That's the structural excavation, common; I made an estimate of that cost at——

Mr. Olson: Just a minute.

Q. I asked you if you did it?

A. Yes, sir, I made an estimate.

Q. Will you give me the results of that computation, please?

A. I estimated the cost at about \$11,250.00.

Q. How did you arrive at that?

A. Based on taking one and a half labor hours to remove one yard of material, and based on 7500 yards, which was the final estimate quantity for structural excavation, common, and computed on the basis of a dollar an hour for labor.

Q. Now, in your computation did you determine as to the final estimate quantity of rock excavation?

A. Yes, in the final estimate that gave I believe 264 yards; it is a relatively small quantity, and of course rock would have to be shot first, and prices

(Testimony of Tolliff Hance.)

on that would vary from \$2.50 to \$4.00, would be a reasonable excavation price for that.

Q. Is that reflected in your excavation common?

A. No, that would be rock excavation. Rock quantity was so small that even at \$4.00 a yard it would only be slightly in excess of a thousand dollars. [2101]

Q. And referring to item 8 on the final estimate, 246.4 cubic yards, that would be at what per cubic yard?

A. Well, \$4.00 should be a reasonable price for removing that; that is, not in excess of that.

Mr. Holman: You may inquire.

#### Cross-Examination

By Mr. Olson:

Q. You were out on this project on March 11 of this year?

A. Yes, sir.

Q. And you said you examined a few structures; that's the ones that you enumerated by number?

A. Yes, I made a detailed examination of those, plus the west turbine lateral, I didn't put the number down of that—I think it is the east turbine lateral chute; I didn't put that number down.

Q. Now, the only examination that you made of the soil out there is that you saw the surface of the ground as you walked over it, and saw plowed fields?

A. And along the bank of the ditch in a few places you could see where it had washed, and of course I stopped and picked some up and felt of it to get an idea of what it was.



(Testimony of Tolliff Hance.)

Q. The bank of what ditch?

A. The Roza Canal.

Q. The main canal? A. Yes, sir. [2102]

Q. Of course, that bank had been entirely disturbed soil at one time, had it not?

A. Well, not at the places I have in mind. That is, obviously the slope was disturbed, and the portion of the bank was disturbed, but the places I was looking were where it was washed, where water had made little gullies down into the ditch, and cut down into the soil.

Q. The upper bank, or the lower bank?

A. No, that would be the upper bank.

Q. And the testimony you have given as to soil conditions is based on those three things, walking over the surface of the ground, seeing plowed fields, and a few places you saw where rain water had washed the upper bank?

A. That's right, and of course picking it up and examining it in my fingers.

Q. Now, the 70,000 board feet was the lumber you estimated it would take to furnish the forms for this job 1062?

A. Yes, something like that.

Q. What kind of lumber were you figuring, I mean in size?

A. Well, that's two by fours for studs, plates and sills.

Q. How many board feet of two by four did you figure?

(Testimony of Tolliff Hance.)

A. Well, I didn't segregate it that way. One square foot of form surface, to form one time, would require slightly over one board foot of three quarter inch material, and also a little over one board foot of two by four material [2103] for studs, plates and sills. It is based upon two-foot spacing of studs, and about——

Q. You started out, then, with a quantity of a cubic foot of concrete, did you?

A. No, square foot of concrete surface.

Q. Well, let's work on that, then. A square foot of concrete surface requires how many board feet of two by four? A. About 115/100.

Q. All right; what else would it require?

A. It required about 1.1 of three quarter inch sheathing.

Q. All right.

A. Now, that's just for the form itself. Now in addition to that you'll need whalers, or I believe they've been called strong-backs, but the amount of lumber for that I wouldn't allow, oh, over about a fourth of a foot per square foot, because those whalers can be used a good many times.

Q. That's a fourth of a foot of whalers?

A. That's right.

Q. Anything else that you determined for the forms; is that all?

A. No, that was chiefly the figures. There will be a few pieces of bracing, but those will be usually made up out of scraps, a lot of it can be used out of waste. [2104]

(Testimony of Tolliff Hance.)

Q. Figure any plywood or facing at all for the inside forms? A. No.

Q. You didn't compute anything for that?

A. No.

Q. They would be required, would they not?

A. Well, that's up to the man who's building the job, whether he wants to form them, line them with plywood or Masonite or not line them at all.

Q. I see; it would require some lining, would it not?

A. It wouldn't necessarily require it, no. I've seen them made without it. In fact, whole jobs done without any lining at all.

Q. Now, in figuring your 1.1 sheathing, I take it you mean the ship-lap? A. That's right.

Q. What grade of lumber did you consider in your figures?

A. Well, grade of lumber would determine the cost, but it wouldn't determine the amount.

Q. Well, supposing that you had a board foot of the type of lumber that I show you now, could you make forms for this job with this type of lumber that I'm now showing you, being part of the exhibit here in Court?

A. You couldn't without lining them, no.

Q. You would either have to line them or it would take a good deal more lumber than that, to cut out these knotholes? [2105]

A. Well, it would be virtually impossible to make a satisfactory form out of that, without lining it.

(Testimony of Tolliff Hance.)

Q. You think it would be virtually impossible to make forms out of this lumber, without lining it?

A. I would think so.

Q. In other words, this type of lumber would have to be cut out and thrown away, and use only the good portions of the lumber, or else line it?

A. That's right.

Q. So that on your figures, then, you're figuring lumber that's suitable for making forms?

A. Yes, because I'm not figuring any lining.

Q. Are you figuring when you figure a square foot of concrete, do you mean that it would take that much ship-lap on each side of the square foot?

A. Well, for each square foot of surface, that's right.

Q. How much square footage did you determine on this job, that required forms?

A. Oh, it ran about 120,000 square feet altogether.

Q. 120,000 square feet of contact area of the concrete?

A. That's right.

Q. And you figured that the lumber could be re-used, I think you said, the forms, approximately five times?

A. I would think so, if they were lined. [2106]

Q. Did you also figure that with reference to the stilling pool and the chute?

A. Well, no, the chute could be—that is, there is ample opportunity on that chute to use the same forms a good many times.



No. 11707

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

and

A. J. GOERIG and CLYDE PHILP,  
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,  
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

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Transcript of Record  
In Five Volumes  
VOLUME V  
Pages 1909 to 2262

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Upon Appeals from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

FILED  
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No.11707

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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**CONTINENTAL CASUALTY COMPANY, a Corporation,**  
**Appellant,**

**vs.**

**M. C. SCHAEFER, an Individual doing business as**  
**CONCRETE CONSTRUCTION COMPANY,**  
**Appellee.**

**and**

**A. J. GOERIG and CLYDE PHILP,**  
**Appellants,**

**vs.**

**CONTINENTAL CASUALTY COMPANY, a Corporation,**  
**Appellee.**

**and**

**SAM MACRI, DON MACRI and JOE MACRI,**  
**Appellants,**

**vs.**

**M. C. SCHAEFER, an Individual doing business as**  
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**Appellee.**

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**Upon Appeals from the District Court of the United States**  
**for the Eastern District of Washington**  
**Southern Division**

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(Testimony of Tolliff Hance.)

Q. And how did you figure it on the chute?

A. I didn't figure the chute in, that is, the estimate that I made, I didn't go through and compute every structure all the way through. I computed a few typical structures and made an estimate, chiefly because of the time involved. It would take a long time to take all those 536 structures and figure up every one of them.

Q. Well, yes, I appreciate it would. As far as the chute's concerned, then, you didn't figure that at all?

A. No, I didn't make any, because I didn't figure it was representative of the job as a whole. It is a special structure, or a portion of it. You have a chance to completely wear out a well-built form, because I believe one section is repeated there about 175 or 80 times, and on the other hand, the stilling basin is a separate structure, on which you would have no re-use of forms, and for that reason there would necessarily be no correlation of the rest of the job.

Q. So your figures do not include the stilling pool, then, or the chute? [2107]

A. No, sir.

Q. And how many structures did you take to arrive at your average lumber per square foot? You said you took a few structures. How many did you take?

A. Oh, I don't have it, I didn't bring those computations with me. I think there were about eight or ten.

(Testimony of Tolliff Hance.)

Q. Now, if they were unable to re-use these forms this five times, of course that would obviously change your lumber estimate, wouldn't it?

A. That's right.

The Court: I think it is time for recess now. With reference to the witness S. R. King, who apparently is unable to attend at this time, for which we have a doctor's telegram here that it is unsafe for him to travel, I notice that the telegram in which he states that Mr. King's telegram to you, Mr. Holman, that it was necessary for him to return home because of a change in his physical condition, is dated the 27th of February.

Mr. Holman: That's right. Your Honor will recall that I asked to call him out of turn the morning following, counsel consented, and instead, he returned to Spokane that night.

The Court: Oh, he was subpoenaed originally to attend here, and was in attendance?

Mr. Holman: Yes, I subpoenaed him here, and he [2108] came voluntarily.

The Court: And his home is in Cheney, in the eastern district. I think the record should show, however, that this telegram of the 27th indicating that Mr. King had return home on account of his physical condition was not called to the Court's attention until the 17th day of March; that's correct, isn't it?

Mr. Holman: I read those telegrams to you that following morning, your Honor.

(Testimony of Tolliff Hance.)

The Court: The morning of the 28th? Will you look back through your notes, Mr. Taylor, and let me know what was the case?

Mr. Holman: Because I had the arrangement with counsel to call him that morning.

The Court: I don't recall that this telegram was called to my attention until yesterday, the 17th of March. Did you ask permission to take his deposition on the 28th of February?

Mr. Holman: Oh, no, your Honor, because he promised to return when needed. I talked with him on the 'phone and talked with him in Spokane.

The Court: When was this telegram filed?

Mr. Holman: This morning. You see, I got two on that day.

The Court: Well, I just wanted the record to show [2109] the circumstances here. I wasn't sure when the matter was brought up whether a witness could be compelled to attend within the district, if he's more than 100 miles from the place of trial, but the Rules of Civil Procedure are very explicit; rule 45, subdivision e, on page 60, provides that a witness may be compelled to attend if he's within the district or within 100 miles of the place of trial.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

(Testimony of Tolliff Hance.)

Yakima, Washington, Tuesday, March 18, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

The Court: The reporter, Mr. Taylor, has consulted his notes, Mr. Holman, and says he finds you called my attention to the telegram on the 27th. You must have received it that day.

Mr. Holman: I remember the Clerk brought me a copy.

The Court: And you called it to my attention as an explanation as to why the witness wasn't called, but didn't ask for a deposition at that time.

Mr. Holman: No. In fact, I never intended to take a deposition, and I think as the case now stands I [2110] think I'll not apply for a warrant.

The Court: I wanted to make clear that what I said about this matter before lunch was not intended to imply any criticism; I just wanted the record to be straight as to the circumstances of why he was unable to attend.

### Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Hance, with respect to the equipment that the Concrete Construction Company had on the job, they were showing you a picture of the Mixomobile and a picture of the Buggymobile. Now,



(Testimony of Tolliff Hance.)

as I understand, you think that equipment was not entirely applicable or practical on this type of work?

A. On such a small job, that's right.

Q. On account of it being such a small job?

A. That's right.

Q. In other words, the basis for your opinion that it is not applicable is that its capacity exceeded the needs of this job?

A. Yes.

Q. What type of equipment would you say was reasonable on the job?

A. Well, you need equipment with a high degree of portability and the cost of that equipment on the job should be as low as possible consistent with pouring 1500 yards of concrete [2111] in the proposed program. For a job this size I would recommend something about like a two-sack mixer, or a small size transit mixer.

Q. You would recommend a transit mixer, would you, or a small size——

A. Well, either one. I think probably both could be applied. The operations, in my own experience, the most successful operations on this job have been used by easily moved two-sack mixers. They're relatively light, they can be towed quite readily behind a truck from one place to another, and they pour or manufacture concrete to be placed in the structure at a rate comparable with what you can put that in the structure, and it is the job of this type that usually limits the rate, rather than your mixer capacity; that is, you can't always, even

(Testimony of Tolliff Hance.)

with a two-sack mixer, keep it at capacity. You can approach it; you can exceed a one-sack mixer capacity, and for a large capacity your bottle-neck would be placing your forms. You could manufacture concrete two or three times as fast as you could place it, so you have an investment in equipment which is wasteful, and I think a two-sack mixer would probably be about the best, as far as capacity is concerned.

Q. Assuming your aggregate has to be weighed, would your two-sack still be applicable? [2112]

A. Yes. You have portable scales that can be moved easily, wheelbarrows and buggies that can be weighed, get your tare weight on them, and your scales, they manufacture them with several arms on them, you can measure a different quantity each time; and it is a relatively simple operation to weigh that, and all the equipment then that you use can be put on one flat bed truck for portability, maybe fifteen or twenty minutes after you pour a form.

Q. Where would you place your aggregate before you put it on the scale?

A. You could stock-pile it near the structures.

Q. Stock-pile it on the ground? A. Yes.

Q. By each structure?

A. That's all right, or each group of structures.

Q. In other words, you would bring your aggregate out with a truck——

A. Scatter it around.

Q. ——and dump a stock-pile on the ground; and how would you get it on the scale on the truck?

A. Wheel it up.

(Testimony of Tolliff Hance.)

Q. Shovel it up on the scales on the truck?

A. On the wheel-barrow, using a buggy or a wheel-barrow.

Q. You have your scales on a wheel-barrow?

A. No, you would have your scales on the ground, but you would be charging your mixer, a small mixer, you would be charging that, with that type of operation, you would be charging it with wheel-barrows or small two-wheel buggies.

Q. You would shovel it off the stock pile onto a wheel-barrow?      A. That's right.

Q. Wheel it onto the scales?      A. Yes.

Q. And shovel it out of the barrow into the mixer?

A. Just dump it into the mixer hopper.

Q. You think that would take less time and cost less money than to operate the Mixomobile?

A. I think so.

Q. How many men would you have on that operation?

A. Just for charging the mixer?

Q. No, for pouring the concrete under your suggested method.

A. Well, now, in order to arrive at an answer to that, we have to make assumptions as to how many sizes of aggregate you would have, you would have sand, one, one on the barrow, one on the scales, one on the mixer, and of course your placing crew out in front would depend on whether you were discharging from the mixer into the forms or whether using wheel-barrows or buggies.

(Testimony of Tolliff Hance.)

Q. That would take more men than the Mixomobile, wouldn't it? [2114]

A. That would depend on how you charged your Mixomobile. If you used batching trucks, it takes one man or two, at least one, on the batcher, and a man to drive your truck down, and one man on the mixer, and those men would not be using their time efficiently; your truck driver is a higher rate of pay than your laborer who wheels the wheelbarrow. It would take more men, but the quality of men would probably be such that the rate of pay would be less.

Q. It would take more men, but you don't think it would cost quite so much money?

A. Well, probably about the same, as far as money is concerned, of the labor.

Q. Then where would a saving occur?

A. With moving your larger mixer, you can't move large equipment as rapidly as you can small equipment; you have the same provision for pourability. Just like comparing a passenger car with a heavy truck; it's harder to maneuver and get it around. True, when you get out on a paved highway maybe both will have the same top speed, but on construction of this type, we're not working on highways.

Q. You mean to say that a truck towing this two-sack mixer would move faster on that terrain than this Mixomobile, which is self-propelled?

A. I believe it could. The particular system that I've [2115] described I've seen in operation.



(Testimony of Tolliff Hance.)

It would take about fifteen minutes after completion of pouring the structure to load all the equipment that you need on to the flat bed truck, hook the mixer on behind, and tow it down to the next structure, and depending on how far away the structure is, but where they're fairly close together, only 500 feet or so, and get set up for the next one.

Q. Well, it would take even less time for the Mixomobile to move, wouldn't it?

A. Well, they move pretty fast on good roads. I don't know about in rough going. I've never seen a Mixomobile used on this type of thing. The only thing I've seen is where you had pretty fair roads to travel on; and the matter of moving a big mixer, jockeying it into position to the forms, that takes time too.

Q. It weighs less than your transit mixer, doesn't it?

A. All depends on the size of transit mixer.

Q. Well, your ordinary size transit mixer?

A. They run all the way from one and a half to six yards.

Q. Well, say a two yard transit mixer, if you know?

A. I don't know what a two yard transit mixer would weigh, offhand.

Q. Do you know how much this Mixomobile would weigh, offhand?

A. No, I don't have figures on it. I imagine it would be fairly close to the weight of a paver. [2116]

Q. Of what?

(Testimony of Tolliff Hance.)

A. A yard paver; probably in the neighborhood of twenty thousand pounds or more.

Q. You think this Mixomobile would weigh close to twenty thousand pounds?

A. I would imagine.

Q. Empty?

A. Well, yes, probably would weigh close to that, empty.

Q. And if in fact it weighed say two tons less than that, that would affect your estimates considerably, would it not, on whether it had the maneuverability?

A. Between sixteen and twenty thousand pounds; make it sixteen thousand. It would have some effect on maneuverability; I wouldn't imagine a great deal as compared with a two ton flat bed that only weighs four thousand pounds, and the mixer behind it that travels on its own wheels.

Q. Well, on your two-sack mixer, you're going to have to put on an extra truck, is that right, to pull your two-sack mixer around?

A. Well, the same truck that carries your equipment from one hole to another, you have to have certain equipment to place your concrete, you have to have a truck for that.

Q. Well, the Mixomobile will carry your vibrator and your other equipment right along with it?

A. I don't know how much room there would be on the Mixomobile for that equipment.

Q. Ever operate a Mixomobile?

A. No, I haven't.

(Testimony of Tolliff Hance.)

Q. Ever had any experience with a Mixomobile in a job of this kind?

A. Not on a job of this kind.

Q. You're not really stating to this Court that that Mixomobile wouldn't go out there and do a good job, are you, Mr. Hance?

A. It isn't impossible to pour the concrete, no. As far as manufacturing, it will manufacture concrete as well as any other mixer..

Q. And it will go out and do this job as well as any other mixer, won't it?

A. From the standpoint of making the concrete, yes.

Q. From the standpoint of doing the whole job, going from one structure to another, and pouring the concrete, and maneuverability?

A. You asked me originally, that is, from the standpoint of practicability. The question of possibly doing a good job is one thing, with any size mixer; the practicability is something else. The practicability of cost of that equipment, if you have a heavy piece of equipment, that has a rental value of four or five hundred dollars a [2118] month, tied up on the job, as compared with a piece of equipment that has a rental value of \$150.00 a month, and you tie them up on the job the same length of time, it seems to me that is impractical on the basis it is not particularly economic.

Q. Then you're basing your opinion on the fact the Mixomobile is expensive?

A. That would be a large factor.

(Testimony of Tolliff Hance.)

Q. Well, is that the factor?

A. Yes, chiefly.

Q. Now, if you used transit mixers—or do you say that transit mixers are not advisable?

A. I think you could use a transit mixer, a small transit mixer, satisfactorily.

Q. Do you think it would be any cheaper to do the operation by transit mixers?

A. On the basis of the monthly rental, probably not. The monthly rental on transit mixers is relatively high.

Q. And it would take at least four of them to do what this one Mixomobile would do, would it not?

A. Well, I——

Q. Or do you know?

A. Well, that would have to be qualified according to the distance they had to travel.

Q. Do you know how far they had to travel out here? [2119]

A. No; I imagine it would vary according to the location of the particular structure to the stock-pile.

Q. It may well be, then, as to the nature of the information you have as to the nature of the aggregate and your distance of haul and considering your lack of experience with a Mixomobile, that this equipment Mr. Schaefer had on the job was as adaptable and as practical as any other type of equipment would have been?

A. Well, I still can't quite agree with that, on the basis of that rental value.



(Testimony of Tolliff Hance.)

Q. What do you think a Mixomobile costs?

A. I haven't been able to find any quotations on it; it isn't listed in the A.T.C. rate book that I happened to have, but the estimate, any time you get up into a mixer of that size you would probably be paying, new, for it, \$10,000.00; even possibly more; eight or ten thousand dollars.

Q. Eight to ten thousand dollars? A. Yes.

Q. And how much would a two yard transit mixer cost? A. \$4500.00, complete.

Q. \$4500.00?

A. That's right, about that. I happened to price some of those about a little over a year ago, investigating a gravel plant and a transit mixer plant in Spokane which was [2120] for sale. The man had five transit mixers, and he paid about \$2200.00 apiece for his trucks, and about \$2500.00 apiece for his mixers.

Q. Were you there when he bought them, or is that what he told you?

A. No, that was the information that I got from his books.

Q. What do they cost new?

A. That was supposed to be the new price on it.

Q. Isn't it a fact that they cost around eight or nine thousand dollars apiece, transit mixers, two yard transit mixers?

A. Well, that wasn't the information that I got from it.

Q. Well, do you know at all, Mr. Hance, outside of what you saw in somebody's books over in Spokane? A. No, I haven't investigated it.

(Testimony of Tolliff Hance.)

Q. So it is a fact, is it not, that you really are not posted on the relative cost of concrete mixing equipment, Mixomobiles or transit mixers?

A. No, not on those two particular items.

Q. Now, the Mixomobile can start right to work in the morning with the aggregate on hand and immediately start mixing concrete, can it not?

A. Yes, as far as I know.

Q. Whereas the transit mixer has to load up at the batching plant and then drive clear to the particular structure? [2121]

A. That's right.

Q. And the transit mixer has to remain at the structure until its concrete is all spilled out?

A. That's right.

Q. Whereas with the Mixomobile, the aggregate can be hauled in by truck, dumped into the Mixomobile, and emptied at once, and then the truck can go back and get some more aggregate?

A. That's right.

Q. And not be tied up? A. That's right.

Q. And that's the reason, is it not, Mr. Hance, that one Mixomobile will pour as much concrete as four transit mixers?

A. Well, there's no question about the Mixomobile being able to pour enough concrete; that is, it can run thirty yards an hour out there, but can you use thirty yards an hour in your structures? That's the point I was trying to make.

Q. Would you say Mr. Schaefer's equipment had plenty of capacity for the job?

(Testimony of Tolliff Hance.)

A. I would say Mr. Schaefer's equipment had plenty of capacity for the job.

Q. And this little Buggymobile had plenty of maneuverability to get into the structure to pour the concrete? [2122]

A. Well, now, that Buggymobile, I've never seen one of those in operation at all.

Q. Do you know anything about the Buggymobile at all?

A. Merely what I've seen in literature, advertisements and so forth of the manufacturer, and the picture you showed me. I've never seen one of those in operation.

Q. In other words, that's new, modern, right up to date equipment, isn't it?

A. Yes, I think it's relatively new. It hasn't been in advertisement for very many years.

Q. Now, you said you measured some of the walls on the structures and found one, I think you said, was a half an inch thicker than what the plans call for?

A. That's right.

Q. Do you remember which structure that was?

A. No, not particularly that one; there was only one instance of it of a half inch. I don't recall exactly which particular structure it was among those structures that I enumerated.

Q. You measured that just at the top, did you?

A. That's right, at the top.

Q. You didn't measure it from the invert on up and take an average?

A. Well, it is hard to measure through a wall at the bottom, no. There were specifically, as I'd

(Testimony of Tolliff Hance.)

go along the wall, [2123] there would be a five inch wall, one end would be four and three quarters, the other end as much as five and three eighths. Some of them were pretty uniform all the way through; some of them were only off within an eighth of an inch, and most structures I found walls from a quarter of an inch narrow to three eighths too wide, not necessarily the same wall.

Q. And that's measured entirely on the top—

A. That's right.

Q. —of the structure? A. That's right.

Q. Now, in arriving at these depths of the structures you used the structure lay-out plan?

A. Yes, sir.

Q. Now, in order to figure the depth of a head wall, that's a very simple process, is it not, Mr. Hance? A. Yes, sir.

Q. You simply take the elevation which is shown on the top of the wall— A. That's right.

Q. —the elevation shown on the top of the invert, and subtract the invert from the elevation of the top of the wall? A. That's correct.

Q. And just that one mathematical operation gives you the [2124] height of that wall, doesn't it?

A. That's right.

Q. Your figures here do not include the thickness of the concrete slab? A. No, sir.

Q. So that your figures would all be increased by the amount of the concrete slab, as far as the depth of the excavation is concerned?

A. That's right.



(Testimony of Tolliff Hance.)

Q. Now, you indicated that these structures were from one to one and a half feet, did you say, above the surface of the ground?

A. There were some in that classification, yes.

Q. And there were others that were right flush with the ground, is that right?

A. No, the classification I gave you is the inside height of the wall. The structure may have been sitting on top of the ground, the natural ground, but that is the height of the wall of the structure.

Q. Maybe I misunderstood you. I thought you were indicating that the top of the structures, the head walls, would average one to one and a half feet above the surface of the ground.

A. No, that was the height of the head wall above the invert grade of the concrete. Now, I can't testify as to the [2125] level of the natural ground around there, because the engineers of the Bureau of Reclamation are probably the only ones that have that information. Frequently you find these structures sticking above the ground, but it varies quite a bit on the particular structure.

Q. I must have misunderstood you. You didn't intend to, and don't now testify as to any heights that the head wall of the structure extends above the surface of the ground?

A. No, sir.

Q. Now, did you say that you figured out how much it would cost to excavate all of these structure excavations by hand?

A. Yes, I made an estimate of that cost.

Q. And that was \$11,250.00?

A. That's right.

(Testimony of Tolliff Hance.)

Q. Now, how did you say you arrived at that?

A. Based on taking an hour and a half for one man to move one yard of dirt, the labor cost at one dollar per hour, and the final estimate quantity of approximately 7500 yards for common excavation.

Q. Did you take into consideration any time that would be consumed in fine grading?

A. Allowing an hour and a half should allow time for fine grading.

Q. Did you ever do any of that type of work?

A. Fine grading?

Q. No, this type of hand excavation, and fine grading, yes.

A. Yes, sir; that is, I've supervised it.

Q. Well, that's what I meant, Mr. Hance.

A. Yes.

Q. How long ago?

A. Oh, that was—I did some in 1937, and the last of it was early in 1941.

Q. Was that on this type of structures?

A. Not entirely. Part of it was, yes.

Q. Did that include head walls and curtain walls?

A. That's right; little cut-off trenches.

Q. Fillets?           A. Oh, yes.

The Court: I'm not sure that I understand this witness' testimony clearly with respect to the cost figures that he gave here. Was that for the hand excavation, or for all of the excavation?

Witness: No, that's hand excavation of the entire item, whatever it is in the specifications, of excavations for structures. The basis for that was

(Testimony of Tolliff Hance.)

one contractor's operation wherein he elected to leave all the structure excavation in his ditches, and do it all by hand, rather than do it by machine. It looked at the time to me rather peculiar, but under the particular circumstances [2127] on the job it was well justified.

The Court: I still am not sure. Your figure, then, means what it would cost to do all of the excavation by hand on 1062?

A. All of that common structure excavation.

Mr. Hawkins: Does that include the fine grading too, that figure?      A. That's right.

Q. (By Mr. Olson): Well, now, are you taking into consideration the laying out of the sub-grades and putting different sub-grades in each excavation?

A. No; well, there would be different sub-grades, but the actual laying out of the lines to work to, and so forth, that wouldn't be done by the laborer.

Q. Somebody else would have to be there?

A. That's right. You don't expect laborers to know how to do that. You expect to have supervisors there to stake out the work for them and tell them what is wanted, and the laborer could go ahead and dig.

Q. Well, they couldn't do that, could they, while the men were in the hole digging?

A. Well, you can't over-grade a hole; I don't quite see what you're shooting at.

Q. Well, can your lay-out man check his hubs and figure the elevations right while the men are in the hole digging out [2128] one cubic yard every hour and a half?

(Testimony of Tolliff Hance.)

A. No, they would lay a structure out ahead of the time the laborers came in to do their excavation, so when the laborers came in they would have all the information they needed to work with. You wouldn't want your laborers standing around while your supervisor was laying out the hole.

Q. And the cost of that work would be added to your \$11,250? A. That's right.

Q. Now, are you figuring work in the winter-time, when the ground is frozen? A. No.

Q. What type of weather conditions are you figuring?

A. Well, I figured at least the ground was thawed, and this type of material here would be relatively easy to move; at least the silt would be.

Q. You're figuring soft digging?

A. That's right.

Q. And what lateral clearance are you figuring?

A. I'm not figuring any.

Q. You just took final pay cubic yards?

A. That's right.

Q. Well, are you figuring that the laborers could dig just as fast if they were digging a vertical bank or a sloped bank? [2129]

A. Well, it depends; if the slope has to be trimmed and be exact as to lines and grades, it would take longer than if they didn't have to adhere to any particular slope.

Q. How were you figuring it?

A. I didn't figure they were trimming those banks to any particular slope, just whatever the material came down.



(Testimony of Tolliff Hance.)

Q. Did you figure any time spent to get the vertical neat lines, neat cuts against which the concrete would be poured without intervening form, did you figure any extra time allowance for getting that to the neat line?

A. Well, no, that's part of your fine grading, where you have to place concrete against that too. I anticipated that would be enough for fine grading too.

Q. How many of the plans did you go over in making up that estimate?

A. Well, I didn't base it on any specific number of plans. I familiarized myself with the plans going through them and taking off these head wall differences, and making calculations on those eight or ten; I considered myself sufficiently familiar with them from that, then it was merely to arrive at a reasonable estimate of what it would cost to take that out, based upon the final payment.

Q. Well, now, Mr. Hance, isn't it a fact that the greater portion of the work, the time would be consumed in forming the bottom of the excavation and the vertical cuts to [2130] grade and alignment; isn't that where the greater portion of the excavating time would be used up?

A. Well, it depends upon how many yards you have to move with respect to it. Probably—I estimated probably half and half, or maybe a little bit more on excavating than fine grading.

Q. Have you examined the model excavations here?

(Testimony of Tolliff Hance.)

A. I glanced at them one day. I haven't examined them in detail, no.

Q. Showing you page 65 of plaintiff's Exhibit 12, and calling your attention to structures 427 and 428, how much time would it take in hours, man-hours, to fine grade or to shape the base or foundation of the excavation for that structure, including the curtain walls and fillets and the vertical banks against which concrete would be poured without an intervening form, Mr. Hance?

A. Well, how close are you to—that is, how much fine grading, what depth of fine grading do you want to take there?

Q. Well, I'll ask you this: How long would it take to hand excavate that whole structure?

A. Well, I wouldn't know without making some computations as to yardage involved.

Q. Pardon?

A. I couldn't tell you without making some computations as [2131] to the yardage involved.

Q. Well, supposing you hand excavated to 3/10 off, then how long would it take to fine grade it?

A. Well, again that would involve some computation, that is, just fine grading the last three tenths, a man could possibly move a yard and a half of dirt in an hour—I mean a yard of dirt in an hour and a half, and I'd want to make some computations on it before I figured.

Q. When he first started digging how much dirt could he move in an hour and a half, without any fine grading at all?

(Testimony of Tolliff Hance.)

A. Without any fine grading a man ought to do at least a yard an hour.

Q. A yard an hour without any fine grading?

A. Yes, excavation, just soft excavation, spading at a yard an hour or maybe even more than that.

Q. Well, now, when he gets down so he's finished just plain throwing dirt, and gets cutting banks to a line, he's got to stop and find out where that line is, doesn't he? A. That's right.

Q. And that's going to take some time?

A. Well, if it is properly laid out it would take some; not much.

Q. How can a person possibly lay that out on the surface of the ground so that he knows where to put a vertical cut bank that is four or five feet down deep in the hole? [2132]

A. The common way is to set reference stakes with nails in them so a man can stretch a string between the two, and that gives him any line he's interested in on the structures. If that string is in the way he can take it out of the way until he's ready to use it again. That provides his line, and the stakes can be set sufficiently far away so he doesn't disturb them.

Q. So when he was ready to cut that neat bank he would have to go back to some stake off to the side of the hole some place in order to figure out where to put that bank, wouldn't he?

A. That's right.

Q. And that would take some time, wouldn't it?

A. Yes, a few minutes.

(Testimony of Tolliff Hance.)

Q. Well, it would take quite a little time for somebody that's just a dirt digger, shovel man?

A. Well, I don't think so; a matter of two or three minutes to stretch a string.

Q. Well, after he's strung it along on the top of the hole how would that get him down four or five feet in the ground?

A. He can go down with a plumb bob or level.

Q. Then he'd have to hold down a plumb bob or level?      A. That's right.

Q. And is that the way you figured it on this?

A. That's right. That's the way I've seen it done. That's the way I've done, on crews where I had that to do.

Mr. Olson: That's all.

### Redirect Examination

By Mr. Holman:

Q. Mr. Hance, what would be the reasonable cost of the yard mixer type that you spoke of, not the transit?      A. Of the yard mixer?

Q. Yes.

A. Just the mixer itself?

Q. Yes, that would be the two-sack.

A. Oh, you mean a two-sack mixer?

Q. The two-sack mixer that you spoke of, yes.

A. Those vary in price. We bought one at about \$1600.00, is the only one that I was familiar with the exact price. I think that there are different makes that are somewhat cheaper than that, but I can't recall the exact price. It seemed to me they're in the neighborhood of a thousand dollars.



(Testimony of Tolliff Hance.)

Q. Would you say a thousand to sixteen hundred would be a fair price?

A. They do manufacture them, I think, that cost up to two thousand dollars.

Mr. Holman: That's all.

(Whereupon, there being no further questions, the witness was excused.) [2134]

### SAM MACRI

one of the defendants, recalled as a witness on behalf of the defendants Macri, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Mr. Macri, directing your attention to the operations on specification 1068——

Mr. Olson: Now, is this redirect for Mr. Macri?

Mr. Holman: No, this is in chief, on 1068.

Mr. Olson: I thought we were through with Mr. Macri.

Mr. Holman: No, sir.

The Court: Go ahead.

Q. (By Mr. Holman): Calling your attention to the two letters of November 30 and January 3, 1944 and 1945, passing between you and the Concrete Construction Company, plaintiff's Exhibits 30 and 31, the letter of November 30 directing that the work of the Concrete Construction Company begin, and the letter of January 3 notifying the Concrete Construction Company that you were taking over under the sub-contract, what, if anything, did you do with reference to preparing the job 1068

(Testimony of Sam Macri.)

for performance by the Concrete Construction Company? Between this date of November 30, 1944, and December 31, 1944, what did you do?

A. First I ordered lumber and had some lumber delivered. [2135]

Q. How much lumber, Mr. Macri, approximately?

A. Oh, approximately, around 30,000 feet.

Q. How much?

A. Around 30,000 feet; a little more, maybe.

Q. 30,000, you say? A. Yes.

Q. All right, sir, and was that delivered on the job? A. Yes.

Q. And available for making forms?

A. Yes.

Q. What, if anything, did you do with respect to excavation for structures?

A. Well, I moved the shovel over there and started digging.

Q. About when did you move the shovel over?

A. Well, the shovel went over on the job the first part of December. I think she started digging by the 11th of December.

Q. What type of shovel was that?

A. I had a 303 Koehring.

Q. Was that a hoe, or what type? A. Hoe.

Q. And what digging was the Koehring Hoe doing?

A. Well, dig the structure and pipe line.

Q. Well, was there any excavation for structures with that during the month of December? [2136]

(Testimony of Sam Macri.)

A. Oh, yes, the shovel dig quite a bit during the month of December.

Q. And were there any structure excavations ready, including fine grading, before there were any forms built?

Mr. Olson: Now, if your Honor please, his own foreman testified there was no fine grading done until February 5, the man that he hired to do it.

The Court: Well, he isn't bound by any particular witness.

Mr. Holman: No.

A. There was quite a bit dug by shovel, but as far as fine grade is concerned, it was not done until February.

Q. Now what, if anything, was done by the Concrete Construction Company toward placing forms or otherwise proceeding to place concrete on 1068 between the date of November 30, 1944, and December 31, 1944?      A. None.

Q. How do you know that?

A. Well, I was over there, myself.

Q. Did they go on to the job, did Concrete Construction Company go on to the job at all, Mr. Macri?      A. Not to do any work.

Mr. Holman: You may inquire.

#### Cross-Examination

By Mr. Olson:

Q. When did you get your notice to proceed on 1068? [2137]

A. Well, the notice to proceed, customarily the government give it about thirty days after you sign it.

(Testimony of Sam Macri.)

Q. No, that's not what I asked you. When did you get your letter or notice from the Bureau of Reclamation to proceed with 1068?

A. Well, they give us 30 days time.

Q. Do you have the letter, Mr. Macri,? Do you have it here in your files, or does your counsel have it?

A. I don't know whether Mr. Holman has it.

Mr. Holman: No, but I can give you the proceed date.

Mr. Olson: I'll get it. May I have the original file?

Mr. Holman: I'd say it was a June or July date.

Q. (By Mr. Olson): Where is the notice that you got to proceed, from the government, where is that notice on 1068?

A. I think we got him in the file.

Q. In your file where?

A. I can't say if it is here or in Seattle. That I can produce, I guess.

Q. You left that in Seattle?

A. I can't say now if I have it here or in Seattle.

Q. Did you see the complaint that was started on your behalf and in your name down in Oregon?

A. The what? [2138]

Q. The complaint, the lawsuit, the papers that were started for you in Oregon on 1068?

A. Well, it was prepared by the attorney.

Q. Did you see it?

A. I think I signed some paper, but I never read anything.

Q. Well, I'm reading from paragraph 7 of the complaint which was a part of your pleadings in



(Testimony of Sam Macri.)

this case, entitled in the Circuit Court of the State of Oregon for the County of Multnomah, Sam Macri, Joe Macri and Don Macri, a copartnership doing business under the assumed name and style of Macri and Company vs. M. C. Schaefer, a sole trader, doing business under the assumed name and style of Concrete Construction Company, reading from paragraph 7: "That on the first day of July, 1944, the plaintiffs received official notice to proceed with its said contract, and did in fact proceed with and commence performance of said contract shortly before receipt of said official notice, on or about the 28th day of June, 1944." Now is that date correct that you received the notice to proceed on 1068 from the Bureau of Reclamation, on July 1, 1944?

A. If the Bureau send it, must be correct.

Q. Well, Mr. Macri, you're the one that received it. Now, is that right or is it not right?

A. I think it's right. [2139]

Q. That's about the time you got it, about July 1?

A. Every time we sign a contract they give us notice to proceed, right after we sign the contract.

Q. And you didn't start any work on 1068 until December, you said you moved the shovel down there?

A. Just the structures; we started to do some work long before that.

Q. What kind of work did you start doing down there?

A. The open canal.

Q. The open canal?

A. Yes.

(Testimony of Sam Macri.)

Q. But as far as Mr. Schaefer's work was concerned, you started in on December 11, you said.

A. Yes, sir.

Mr. Olson: That's all.

#### Redirect Examination

By Mr. Holman:

Q. Well, on December 11, at the time that you started in excavating for structures, what was Mr. Schaefer's crew and equipment doing?

A. Well, they was working 1068 then—I mean 1062.

Q. They were then working on 1062; had they yet completed 1062?

A. No, they wasn't completed then.

#### Recross-Examination

By Mr. Olson:

Q. You weren't through with 1062 yet either, were you, Mr. Macri? [2140]

Mr. Holman: That's objected to as immaterial.

The Court: Overruled.

A. Well, I have to wait until they pour concrete, so we can back fill and finish up.

Q. You weren't through excavating on 1062 either, was you?

A. I think there was some there.

Mr. Olson: That's all.

Mr. Holman: That's all.

(Whereupon, there being no further questions, the witness was excused.)

ELIZABETH CALLAHAN

a witness called on behalf of the defendants Macri,  
resumed the stand and testified further as follows:

(Whereupon, copies of checks and vouchers  
Macri to Schaefer were marked defendant  
Macri's Exhibit No. 99 for identification.

(Whereupon, copies of checks and vouchers  
Macri payments on specification 1062 on behalf  
of Schaefer were marked defendant Macri's  
Exhibit No. 100 for identification.)

Direct Examination

By Mr. Holman:

Q. Now, handing you—well, for the purpose of  
the record, your Honor, I'm not sure that it's clear,  
Miss Callahan, I believe you testified before, your  
employment; what is your employment? [2141]

A. General office work.

Q. For whom? A. Mr. Macri.

Q. And did you at my direction secure from the  
records of Macri and Company the various carbon  
copies of the voucher checks which were transmitted  
to the Concrete Construction Company?

A. Yes, sir.

Q. Handing you what is marked Macri's 99 for  
identification, will you tell me whether or not that  
is a complete set of the voucher checks or not, for  
the payments?

A. Well, there are two checks that didn't have  
vouchers.

Q. This is the rest of them? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. Now, directing your attention to each one of these by number, for brevity, number 1012 of September 29, 1944, number 488 of November 7, 1944, number 521 of November 22, 1944, number 523 of December 27, 1944, number 804 of February 8, 1945, and number 946 of February 26, 1945, were the originals of those checks paid and cancelled and returned to you? A. They were.

Q. Do you have those? A. I do.

Mr. Holman: I offer 99 in evidence, your Honor, for the [2142] purpose of establishing the transactions as between Macri and Company and the use plaintiff, with respect to the estimated quantities of the work throughout the periods I have indicated from these respective carbons of the checks in question.

Mr. Olson: Your Honor, this is a duplicate exhibit. Counsel has already put in the originals of the vouchers, as I understand it.

Mr. Holman: Well, the only difference is this is the check also, your Honor; it is the carbon with the check.

The Court: Is this a duplicate of another exhibit here?

Mr. Holman: Well, I haven't checked against these yellow ones, your Honor. I don't know whether they are the same or not.

The Court: Well, it will be admitted as additional data here on the vouchers that are not on the checks.



(Testimony of Elizabeth Callahan.)

Mr. Olson: The vouchers are the ones that are in; that's what they did put in before, was the data on the vouchers.

The Court: Let's see, I haven't checked through these, but does this latter identification 99 include all these vouchers in 76, with the checks attached to them?

Mr. Holman: I haven't checked against 76, your Honor, [2143] because counsel says that's all he had, and I just haven't checked it.

The Court: My thought is there is enough documentary proof here, the record is voluminous enough as it is. If they're the same, why not withdraw 76 and put this in in place of it, if there is no objection on the ground it is a copy.

Mr. Olson: That would be all right.

Mr. Holman: I would like to check against the other.

The Court: Well, the latter will be admitted.

(Whereupon, defendant Macri's Exhibit No. 99 for identification was admitted in evidence.)

### Direct Examination

(Continued)

By Mr. Holman:

Q. Now, handing you what has been marked Macri's identification 100, calling your attention to the dates there, number 2151; September 10, 1945; number 1723, July 28, 1945; number 1740 of July 28, 1945; number 2148 of September 10, 1945;

(Testimony of Elizabeth Callahan.)

number 2149 of September 10, 1945; and number 2150 of September 10, 1945, will you tell me whether or not the checks as shown by those vouchers were currently cashed and paid?     A. Yes, they were.

Q. And what is the explanation with reference to all of those checks, being in the months of July and September, 1945, [2144] Miss Callahan? What are they for?

A. Well, they're payment of garnishments and levies by their creditors made against us, and the amounts we paid out at their direction.

Q. I offer in evidence, your Honor, and for the same purpose, Macri's 100; and by the way, Miss Callahan, I notice that number 2151 for \$1639.96 is shown payable to our firm as attorneys for L. Colucio; do you know whether that was a re-payment or a payment through us to the surety in that case?

A. We were directed, I believe it was——

Mr. Olson: Just a minute; I object to any direction somebody gave you. I think this evidence is all immaterial. We've stipulated as to the amount paid. If you're going to offer these then we've got to check every one of them. There's no question as to the amount paid.

The Court: As I understand, counsel's purpose of this is to show progress of the work by payments made at various times on these estimates.

Mr. Holman: That's right.

Mr. Olson: Well, these payments were made long after the job was completed and we had gone back to Portland.

(Testimony of Elizabeth Callahan.)

Mr. Holman: That's true, but they're [2145] still payments and showing what they are and in connection with this job.

Mr. Olson: We'd like to check your vouchers, then.

Mr. Holman: Well, that's all right. There's one to me for \$1600.00 and one for some \$10.00, but I'll show you I didn't get the money.

Mr. Olson: You mean the check wasn't cashed?

Mr. Holman: May I expedite with the witness, your Honor? I want her to get some other papers here.

The Court: Yes.

Mr. Holman: Would you now, Miss Callahan, from the files you have locate the lumber bills pertaining to lumber on 1062?

The Court: She can be finding those while Mr. Olson is checking over these vouchers.

Q. (By Mr. Holman): Miss Callahan, have you at my direction made a compilation of the lumber with respect to the bills, as shown for delivery?

A. I have.

Q. Would you step here and indicate which it is, please?

A. One is made up more in detail. One is by yard and one is by month.

Q. Very well. [2146]

(Whereupon, list of lumber furnished to 1062 by months was marked defendant Macri's Exhibit No. 101 for identification.)

(Testimony of Elizabeth Callahan.)

(Whereupon, list of lumber furnished to 1062, showing source, was marked defendant Macri's Exhibit No. 102 for identification.)

Q. (By Mr. Holman): Handing you what has been marked Macri's identification 101, what is that computation, Miss Callahan?

A. That is the lumber delivered to specification 1062, by the month.

Q: And what is Macri's identification 102?

A. It's a little more in detail on the lumber delivered to 1062, as to size, by yard.

Q. Now, with reference to Macri's identification 101, can you indicate from that compilation and the bills you have the quantity of lumber that was delivered to 1062 in the month of March, 1944?

Mr. Olson: That's objected to, your Honor, as not being the best evidence.

The Court: Is she testifying from the books, or from her own compilation?

Witness: From the bills.

Mr. Holman: From the bills, your Honor. In other words, if counsel wants me to take each bill, I'm ready to do it, but that would be interminable. If your Honor [2147] desires that, I can go right through the bills, a stack of bills. This is a compilation from those bills.

The Court: The bills from which the compilation is made are available?

Mr. Holman: Yes, right here.



(Testimony of Elizabeth Callahan.)

Mr. Olson: My point is, how does Miss Callahan know what lumber was delivered to 1062? I have no objection to the compilation.

Q. (By Mr. Holman): What source do you have, Miss Callahan, for knowing the lumber was delivered to those jobs, or that job?

A. I have the statement bills and packing slips signed by the men on the job. In some cases they're Macri and Company men, and in some cases they're Concrete Construction men.

Mr. Olson: That still doesn't show that they have any connection with our job. They had a lot of work over here.

Q. Do they show the place of delivery, Miss Callahan?

A. You mean the delivery receipts?

Q. Yes, with respect to whether it is Sunnyside or Prosser job.

A. Well, of course, at the time some of these were made the Prosser job was not in progress, but they tell by the man who signed for them, you can tell what payroll he's on, [2148] and is charged to that job through the books; I don't know as I exactly understand.

Mr. Holman: I had in mind, your Honor, that this would be a matter of cross-examination as to any particular item counsel is concerned with. I merely wanted the job quantity as shown by our books and records.

The Court: Well, if the original records here, or books, or whatever she has, show an allocation

(Testimony of Elizabeth Callahan.)

of the lumber to 1062, either directly or indirectly, so that she can ascertain that, then it seems to me that a compilation made by her would be admissible if the original material from which it is made is available.

Mr. Holman: I have it here.

The Court: On the theory that the originals are voluminous and bulky.

Mr. Holman: That's my purpose.

The Court: If counsel then desires to go into it on cross-examination, the originals will be available. Of course, I don't feel like suggesting how you proceed here, but couldn't her compilations be admitted in evidence?

Mr. Holman: That's what I wanted to do, your Honor.

Q. (By Mr. Holman): Then will you tell me, please, what is the function of 102 as against 101? I believe you said 101 [2149] was by months. Now, what is 102?

A. By company, and it's more in detail as to size; also it's easier to check that with the bills.

The Court: By company, you mean the company from which it was purchased?

A. Yes; source.

Mr. Holman: I offer in evidence 101 and 102. The bills are available upon which they are based. My purpose, your Honor, is not a cost item, but a quantity item of lumber; that's the sole purpose.

The Court: Yes, I understand that. I'm not sure that I understand yet, was Miss Callahan dur-

(Testimony of Elizabeth Callahan.)

ing this period involved in charge of the books and accounts of Mr. Macri's office?

Q. What is your answer? At the time these were current were you in charge of the bookkeeping?

A. No. I got this information from the files and books.

The Court: Well, Miss Callahan is at this time in charge of Mr. Macri's office?

Mr. Holman: Yes, sir.

The Court: I see; all right.

Q. And you have under my directions made these compilations? A. Yes.

Mr. Olson: While they're checking those lumber things I can take up these checks that counsel has offered. [2150] We object to their introduction, your Honor, on the ground that it has been agreed between counsel at pre-trial hearing as to the amount of money that was paid on this job, and received by us, and for which they are credited, so that there's no longer any issue as to the payments. The exhibits, therefore, cannot be offered for the purpose of proving that fact, because the amount is admitted. Now, the checks which are offered here, being Macri's identification 100, are none of them made payable to ourselves, but payable to all different payees; they have self-serving matters on the voucher form of the check, and if they are to be offered they will necessitate our going into a collateral matter of getting the authorizations, if they be charged to us, a written authorization from us, and I'm not just being facetious about it, your

(Testimony of Elizabeth Callahan.)

Honor. The check on top here seems to go to L. Collucio, or seems to go to Brethorst, Fowler, Holman and Dewar for \$1639.96, and says it is a claim against Concrete Construction Company to L. Collucio, whereas the letter I have gives the amount as \$1564.66. As I say, there isn't any dispute as to the amount paid. If we're going to go into these it's going to necessitate going into our authorization of payment, and I don't know for what purpose.

Mr. Holman: The only purpose of these, as I stated [2151] at the time I offered them, is to show that currently, as of these dates, there were still transactions pertaining to the Concrete Construction Company and paid under their order, regardless of the amounts. I'm not interested in the amounts at all, because counsel is exactly right; the pre-trial determined the net balance.

The Court: Well, so far as amounts are concerned and the aggregate amount that may be shown by any of these check vouchers put in here, it is my view that the agreement reached in the pre-trial conference and embodied in the pre-trial order is binding on all the parties here, and that they would be limited by that figure agreed upon, regardless of what the proof now is here, so far as payment is concerned. The only thing I'm concerned with is whether these vouchers might be admissible for some other purpose than to show the amount paid by Macri for Schaefer.



(Testimony of Elizabeth Callahan.)

Mr. Olson: The amount isn't the same as our authorization.

Mr. Holman: It is immaterial.

Mr. Olson: It isn't to us.

Q. (By Mr. Holman): In that connection, Miss Callahan, do you have a copy of the letter setting forth these deductions, addressed to Concrete Construction Company?

A. Yes, I can explain that, if it is allowable.

The Court: I'll overrule the objection and let them in for the limited purpose of showing the transactions at this time.

(Whereupon, defendant Macri's Exhibit No. 100 for identification was admitted in evidence.)

Direct Examination  
(Continued)

By Mr. Holman:

Q. Do you have a copy of a letter that was transmitted to Concrete Construction Company showing these payments?

A. Yes; not in this file, though.

Q. Do you have that here?           A. Yes.

Q. Could you get that, please?

(Whereupon, copy letter Macri to Schaefer, September 10, 1945, was marked defendant Macri's Exhibit No. 103 for identification.)

Mr. Holman: Counsel, do you have the original with you of the letter of September 10, 1945?

(Testimony of Elizabeth Callahan.)

Mr. Olson: I don't know; I haven't the slightest idea.

Q. (By Mr. Holman): Handing you what has been marked Macri's identification 103, can you tell me whether or not that is a true and correct copy of the transmittal as of September 10, 1945, that was sent to the Concrete Construction Company? A. That's right. [2153]

Q. Did you send it, Miss Callahan?

A. I did.

Mr. Holman: I offer that in evidence, your Honor. This is not the carbon, but it is a copy of it, and for the same purpose, your Honor; not for the purpose of fixing figures at all.

Mr. Olson: We object to this letter, defendant Macri's identification 103, your Honor, on the ground that it's a compilation of self-serving figures, it's not the best evidence, doesn't even purport to be a carbon copy of the communication, and it's not material to prove any issue in this case.

The Court: Well, I'll have to see it before I can rule on it, I think.

Mr. Holman: I didn't intend it as a carbon copy.

Mr. Hawkins: Do you have another copy of that, Miss Callahan? I haven't seen it yet.

Witness: Yes, I made some extra copies, because my typewriter won't make that many carbons.

The Court: I confess I'm getting lost here. I thought these check vouchers were coming in because they had some bearing on the progress of the work, to show there had been delay in the execution of it.

(Testimony of Elizabeth Callahan.)

Mr. Holman: My only purpose, your Honor, of each of these exhibits, as I have said, is not to cover figures, [2154] but to establish that they were current transactions between the parties upon definite information which is contrary to the second cause of action that the use plaintiff asserts. It is the only purpose of it.

The Court: Oh, I see.

Mr. Holman: In other words, may it please the Court, I very definitely understand, I am sure everyone does, that we had a pre-trial and fixed figures, but these are evidences of transactions between the parties, that's all.

The Court: I get your point. In other words, it is your point that there couldn't have been a superseding of the written contract; at least this is still dealing with reference to the sub-contract.

Mr. Olson: Your Honor, this is certainly not the best evidence.

Mr. Holman: No, it is not. If they raise that, I call for the original from their file.

Mr. Olson: We haven't got it; apparently never had it. I've never seen that.

Mr. Holman: In view of that I withdraw it.

The Court: I think if you show the letter was written to Mr. Schaefer you can produce a carbon copy of it.

Mr. Holman: I just had that typed for convenience [2155] and for each of the counsel. Can you find the carbon? Do you have that with you, Miss Callahan?

(Testimony of Elizabeth Callahan.)

Witness: Well, I'm not sure I can tell which one is the carbon, because you asked me to make some extra copies for the court, and I made a lot of extra copies, and now I can't tell which is which.

Mr. Holman: Well, I'll withdraw that identification, your Honor, unless I can identify it.

The Court: It is time for the mid-afternoon recess. I'll recess for ten minutes, and perhaps you can find the carbon.

(Short recess.)

(All parties present as before and the trial was resumed.)

Mr. Holman: Your Honor, may I have the bills and the orders marked as sub-numbers of an identification, by the Clerk, and then I have no objection to counsel checking them.

(Whereupon, Folder of bills and invoices for lumber on 1062 was marked defendant Macri's Exhibit No. 104 for identification.)

Mr. Holman: Then can you give them sub-numbers?

The Clerk: Yes.

Q. (By Mr. Holman): During the recess, Miss Callahan, did you find the carbon of the letter that was submitted to the [2156] Concrete Construction Company?      A. I did.

Q. Dated September 10, 1945?      A. Yes.



(Testimony of Elizabeth Callahan.)

(Whereupon, carbon copy letter Macri to Schaefer September 10, 1945, was marked defendant Macri's Exhibit No. 105 for identification.)

Mr. Holman: May the record show I am withdrawing Macri's identification 103, your Honor, and substituting Macri's 105.

The Court: Yes. All right, do you renew your offer of this?

Mr. Holman: Yes, I do, your Honor.

Mr. Olson: Now, if your Honor please, we object to the introduction of Macri's 105 on the ground and for the reason that it is a copy, it is not the best evidence, no notice to produce was ever served upon the use plaintiff, Concrete Construction Company, to produce the original of this letter, no showing that we ever received the original of this letter, and we find no copy of it, and my client says that he knows nothing of it, so to permit the introduction of a copy without the groundwork being laid is highly prejudicial to us, and upon the further ground that it supports no issue in the case as understood by me, it contains a lot of self-serving figures and documents, [2157] and is highly prejudicial to the plaintiff's case to permit it to go in.

Mr. Holman: Your Honor, I'm ready to concede, if counsel says that he did not receive the original of that, that this copy at this time is not the best evidence; it is all the evidence I have, and that's the reason I make the offer, and again I want

(Testimony of Elizabeth Callahan.)

to assure counsel that I make it for the purpose solely of showing that on September 10, 1945—showing the negotiations between the use plaintiff and Macri and Company regarding the payments of the bills under the contract. I'm not interested in the figures at all.

The Court: There isn't any evidence that it was mailed?

Mr. Holman: Other than Miss Callahan's statement that it was mailed; she so testified.

The Court: Oh, you testified it was mailed? I'll overrule the objection and admit it for the limited purpose of showing transactions between the parties, showing dealing with reference to that date with reference to that sub-contract, specification 1062. As I understand it, the testimony of mailing of a letter and production of a copy is only presumptive evidence, and may be rebutted.

Mr. Holman: That is presumptive evidence of it [2158] being received, that's right, your Honor.

(Whereupon, defendant Macri's Exhibit No. 105 for identification was admitted in evidence.)

#### Direct Examination

(Continued)

By Mr. Holman:

Q. With reference to Macri's 101 you state that it is what?

A. It is a summary by month of the lumber delivered to specification 1062.

(Testimony of Elizabeth Callahan.)

Q. And the detail of that is in the exhibit for identification 104 that's being marked?

A. Yes.

Q. And then 102 is what?

A. It is a further breakdown by source or by yard.

Q. By lumber yard? A. That's right.

Q. And the supporting data on that is in identification 104? A. In that folder, yes.

Mr. Holman: I renew the offer, your Honor, making the copies available for counsel.

The Court: Has counsel seen those?

Mr. Holman: Yes, he's had these, your Honor.

Mr. Olson: I have seen the identifications 101 and 102, your Honor. I haven't seen any of the supporting documents as yet.

Mr. Hawkins: These are both recapitulations?

Mr. Holman: That's right. [2159]

Mr. Olson: Our chief objection, your Honor, to those identifications is that I assume they are offered for the purpose of showing that the lumber was delivered to 1062 on those dates——

Mr. Holman: Right.

Mr. Olson: ——and that's a matter that cannot be within Miss Callahan's knowledge, or that cannot be gleaned from any documents in their file, it seems to me.

The Court: As I understand it, Miss Callahan was not in Mr. Macri's employ or wasn't in his office at the time that this lumber was purchased and delivered; that's true, isn't it?

(Testimony of Elizabeth Callahan.)

Mr. Holman: That's correct, your Honor.

The Court: I can't see from examining these original bills how one who didn't have personal knowledge could tell that this lumber was furnished on this job over here, on 1062. It seems to me that in the face of counsel's objection here, that there must be some further identification as to where this lumber went, whether it was actually used on this job, or delivered here.

Mr. Holman: I recognize that difficulty, your Honor.

The Court: I can't see anything on the original bills except possibly where it was delivered, in some instances, at Sunnyside. The bills go to Mr. Macri's office in Seattle. If there is any method of identification there I'd like to have it pointed out. In other words, how can Miss Callahan say that this lumber was delivered to this 1062 job?

Mr. Holman: Will you answer as far as you can on that, Miss Callahan?

Witness: Yes; they're signed for, the slips or statements, in the first place, these first ones you're looking at are Sunnyside, and these names, as you go through, well, the men working on the job, in some instances Macri's men, in some instances Concrete Construction Company, they signed the receipt for delivery; then those in turn are mailed in to the main office for payment.

Q. (By Mr. Holman): How do you find that those are the men, Miss Callahan? How do you identify the men?



(Testimony of Elizabeth Callahan.)

A. Because they're on the payroll during that time for that job, and of course the bills in the main office are filed by job.

Q. Those were filed for that job?

A. That's right.

Mr. Holman: That's the only proof that I can make through this witness, your Honor, on that.

The Court: Well, I'll overrule the objections and admit them in evidence.

(Whereupon, defendant Macri's [2161] Exhibit No. 101 for identification was admitted in evidence.)

(Whereupon, defendant Macri's Exhibit No. 102 for identification was admitted in evidence.)

Q. (By Mr. Holman): Now, with reference to Exhibit 101, will you please tell the quantity of lumber supported by file 104, identification 104, that was delivered in the month of March?

A. March, 1944?

Q. Yes.

A. 22,523 board feet; 2016 square feet of plywood.

Q. That 2016 square feet applies to plywood, you say?

A. Yes.

Q. Now, in the month of April?

A. April, 1944; 9942 board feet; 800 square feet.

Q. And going on through each month, Miss Callahan, for the purpose of the record only, is the amount shown ahead of BF lumber in each instance

(Testimony of Elizabeth Callahan.)

for the various amounts, instead of detailing them through, below each month, is a——

A. It is totalled.

Q. Yes; now I notice you have May; you have for May how much? A. 456 board feet.

Q. Yes; and then the next you don't indicate the month, but you have out there "7-44," on the side. [2162] A. That's July.

Q. And then the next month, "9-44," what is that? A. September, '44.

Q. Then the other dates down the side, what do those refer to?

A. October, November, December.

Q. Yes, but where you have given specific dates, what do they refer to, the bill, or the date of delivery, or what? A. Date of delivery.

Q. And your total at the end, for all of the months from March, 1944, through February, 1945, is how much?

A. 116,355 board feet; 3456 square feet.

Q. And then taking Macri's Exhibit 102, the first page is what? What is the purpose of it?

A. Well, the first page with the exception of one item is lumber purchased from Potlatch yards.

Q. From the Potlatch Yard?

A. At Sunnyside.

Q. And then taking the second page, what is the purpose of that page; what does it show?

A. It shows in each case where the lumber came from.

(Testimony of Elizabeth Callahan.)

Q. Now, taking the first one, Sequim Lumber Company, where is Sequim Lumber Company?

A. In Sequim.

Q. What State? [2163] A. Washington.

Q. And the next one, lumber hauled to Concrete Construction Company, specification 1062, from specification 1068, by G.M.C. truck Number 18, Macri and Company truck, how is that information obtained?

A. There are some slips in the file showing that they took some lumber in that truck from 1068 to 1062, and it shows the amounts and dates.

Q. Then the next item, lumber shipped from Stadium Home Project in August, and billed to 1062 August 28, where is the supporting data on that?

A. There is a bill in the folder from Stadium Homes to Macri, and then there are individual delivery slips in there, some signed, and I've forgotten the driver's name.

Q. Will those individual slips show the date of receipt, or not?

A. Yes, they show the dates of delivery.

Q. Then the additional item, lumber sent from Stadium Homes Project, purchased from Pope & Talbot, sent to specification 1062—

A. That is some lumber that there is a bill for that they bought from Pope & Talbot, and they did some work on it, I think, at Stadium Homes, and then sent it to 1062.

Q. Did some what?

A. I think it says "ripping." [2164]

(Testimony of Elizabeth Callahan.)

Q. And then the last page, lumber delivered to specification 1062, Roza Project, from Walton Lumber Company, Everett, Washington, where are those bills?

A. They are in the folder, and that was delivered direct to the job.

Q. Lumber delivered to specification 1068 by Totem Lumber Company, and hauled by Hamilton Trucking Service, is that in there?

A. I do not have the bill for that item, only the trucking bill, showing the lumber hauled.

Q. Did you get that quantity off the trucking bill?

A. Yes, the quantity is there, and also showing that Mr. Stickney signed for it.

Q. Now, are the totals shown by this Exhibit 102 the same as the totals for 101, the same quantities of lumber?      A. Yes.

Mr. Olson: You say they are the same totals on those two exhibits?

A. Should be.

Q. (By Mr. Holman): Counsel asked you if they were, Miss Callahan.

A. There is a breakdown, I think, between board feet and square feet. I think you will find the complete total is the same.

Q. Yes, I'm referring to 116,355 board feet and 3056 square [2165] feet; in other words, 102 has no additional or other lumber than is shown in 101, is that right, Miss Callahan?

A. That's right.



(Testimony of Elizabeth Callahan.)

Q. Now, with reference to job 1068, Miss Callahan, have you made a compilation of the expenditures on that job made by Macri and Company?

A. Yes.

Q. Will you come here and get that, please? With reference to specification 1068, Miss Callahan, have you at my direction made a compilation of all of the expenditures involved? A. Yes.

Q. With respect to items 12 and the other items covered by the sub-contract with the use plaintiff?

A. Yes.

Q. Do you have one with you, Miss Callahan?

A. Yes.

The Clerk: It is number 91.

Q. Handing you what has been marked Macri's identification 91, is the first item of labor an item of all the labor or the labor upon the items covered by the sub-contract only?

A. Labor on the items covered by the sub-contract.

Q. And that amount is what?

Mr. Olson: Just a minute. If the Court [2166] please, we object to reading into the record the figures off of this identification, which is not in evidence, and further object to any testimony as to the costs of any items on 1068, upon the grounds first, that it isn't the cost to Macri that's material, but it would be the reasonable cost in any event, and further, your Honor, that there is no testimony in this case upon which to predicate any claim for damages against Mr. Schaefer on 1068. The testi-

(Testimony of Elizabeth Callahan.)

mony still is that there was no fine grading, no holes fine graded, up until February, 1945, upon which the Concrete Construction Company could have placed forms or poured concrete, and the evidence is further that prior to that time Macri and Company took over the form work and unlawfully took over the contract, to the exclusion of the Concrete Construction Company.

The Court: Well, that's one of the issues in this case, of course, as to whose fault it was that there was a breach of 1068 and it wasn't performed by Schaefer. I don't see how I could decide the case or pass upon these questions piece-meal. It is still an issue in the case, and I think that evidence is admissible on the question of damages on Mr. Macri's theory on 1068. Now, frankly, I'm not sure what the measure of damages would be, whether it would be the difference between the bid price and what it cost Mr. Macri, or the [2167] difference between the bid price and the fair and reasonable cost of completing the contract, but it certainly seems to me that it could be connected up, as we did in the Schaefer case, by showing that what Macri's costs were were the reasonable value, and if counsel proposes to connect it up in that way it would be admissible on either theory.

Mr. Hawkins: I have the further objection, the same as I did to Mr. Hendershott's Exhibit, that this compilation is according to testimony prepared from records in the hands of Mr. Macri's office manager at the time these records were prepared,

(Testimony of Elizabeth Callahan.)

and we don't have here the party who actually prepared those basic records, to cross-examine him as to where he obtained the information, and as to the reliability of that information which he used in preparing those basic records, and for that reason I think that the exhibit is not admissible. It is of necessity based upon hearsay, and is merely a recordation of what somebody told the bookkeeper at that time, and can have no probative force in this Court whatsoever. The point that we're trying to get at here is apparently the cost to Macri of his performance of 1068, and it seems to me that this compilation is not competent to prove that; it is based necessarily upon hearsay, and it is clearly not the best evidence of what those costs [2168] were. I'm inclined to join with counsel Olson in that.

The Court: The only way Mr. Macri could show his costs would be by his books. No one would expect him to remember, certainly, what he spent on the job. I'm assuming he could bring his books, there might be a small truck-load of them, and show his costs, and I think it would be admissible.

Mr. Hawkins: If they're properly identified.

The Court: Yes, if they're properly identified as his books. I think the fact he may not have the same bookkeeper now wouldn't deprive him of making his proof. I haven't seen the records on which this is based, of course. I don't know what they show.

Mr. Holman: If your Honor will harken back to this identification yesterday, the details of how

(Testimony of Elizabeth Callahan.)

the source from which these various points, these various numbered items, came, was in the record, other than the amounts, by way of identification yesterday. Now, then, where are the basic books of the charges that are shown on this identification?

Witness: Well, the basic charges of 1068 are all in the books. I was there all during this job.

Q. (By Mr. Holman): Yes, I understood that yesterday; and you made the entries?

A. Some of the original entries are mine, and some are the [2169] auditor's.

Q. Well, they were made under your direction, were they?

A. Yes, I was there during this time.

The Court: I was laboring under a misapprehension. I understood Miss Callahan wasn't in the office part of this time, but she was, during the performance of 1068?

Q. Yes, but not during 1062. Do you have the original books here so that if counsel wants to refer to them they can be referred to?

A. Yes.

Mr. Holman: They're here. At least I've carted them around a lot.

Mr. Hawkins: Well, just to explain my position here, it is the same position I took when Mr. Hendershott was here; what happens is Mr. Macri has an office in Seattle where he keeps his books of account, so he knows where he stands. The book-keeper takes information she obtains in this way; the foreman makes a payroll, sends it to her, she



(Testimony of Elizabeth Callahan.)

takes the data and enters into this ledger; likewise with the lumber: She takes bills sent in from the field and prepares her books from that information furnished her. Now, it has always been my thought or my opinion that you cannot introduce books of account into evidence unless the people that actually furnished the information on which they were made up are [2170] here in court to verify the statements that the books purport to make. In other words, you would have to have the foreman here to testify that he sent that information, and that it was correct, and the bookkeeper to testify that she obtained this information from this foreman, and that these books correctly reflect that information furnished to her by the foreman. I don't see how it can be competently proved otherwise. Otherwise it is simply based upon hearsay and would be self-serving.

The Court: If that's the rule in large and extensive transactions it would be impossible to prove anything by the books. You couldn't bring in over a period of two or three years an army of employees to verify the item.

Mr. Hawkins: I think that would undoubtedly be true. That is my position.

The Court: I get your position all right.

Q. (By Mr. Holman): I have here the cancelled checks; these are the supporting checks, are they not?

A. That is correct.

Mr. Holman: And we have the original records and we have the various receipted bills or state-

(Testimony of Elizabeth Callahan.)

ments involved here for these items, your Honor, and they can be made available, although there are a bunch of checks here. [2171]

The Court: Well, I think that under the circumstances the compilation of Miss Callahan is admissible. I don't know which one is before the Court now. Have you made an offer of one of them here?

Q. (By Mr. Holman): Do you have it, Miss Callahan? A. Yes.

The Court: We were just talking about one item there.

Mr. Holman: Yes, the first item, payroll.

The Court: I think perhaps counsel's objection that she shouldn't read from the compilation until it is admitted is well taken.

Mr. Holman: Well, I'll offer the compilation, then, making available the supporting documents and records.

The Court: I don't know that counsel have seen this before; have they?

Mr. Holman: I furnished them each a copy yesterday, your Honor.

Mr. Hawkins: I believe we've seen them. It is our position that there has to be supporting testimony for each one of these items. It is in the nature of an accounting and seeking to recover a specified amount of damages. I don't see how they can prove their damages by a blanket compilation.

Mr. Holman: I rather challenge the position taken [2172] by the defendants Philp and Goerig

(Testimony of Elizabeth Callahan.)

and their counsel, in view of the fact under any possible contention it couldn't be asserted against them. This is for recovery in favor of Macri against the use plaintiffs, and therefore I just don't see how——

Mr. Hawkins: If you'll stipulate that this has no bearing on your controversy with Philp and Goerig, I have no objection.

Mr. Holman: Well, I can't so stipulate.

The Court: I assume this wouldn't show whether or not Macri lost anything on the whole job; this is the part that would have been or was subcontracted to Schaefer, is that correct?

Mr. Holman: That's correct.

The Court: He may have made money on the whole contract and lost it on Schaefer, but it does have a bearing, I can see, here. The Court will permit you to object if you wish, and have your objection shown in the record. So far as the method of procedure is concerned here, I'll leave that to counsel's discretion. I think this compilation may be shown, where the records upon which it is based are available and it is testified it is made by this witness. If counsel wishes to, have her go over it item by item.

Mr. Holman: I think if it were [2173] introduced in evidence then I would go over the items so it would be in the record, showing where she gets the supporting document.

The Court: The method to which I am accustomed, and it is used a great deal in these P.U.D.

(Testimony of Elizabeth Callahan.)

cases, is to have the compilation admitted, and then go over it item by item and explain it. Are you offering this now?

Mr. Holman: I am.

The Court: Have the objections been made, now?

Mr. Olson: I would like to have the record show that the objections I made to the previous questions asked are now made as to the exhibit.

The Court: The record may show, as to both counsel; unless you wish to withdraw them, the objections as previously made as to both counsel will stand. The objections will be overruled, and it is admitted.

(Whereupon, defendant Macri's Exhibit No. 91 for identification was admitted in evidence.)

#### Direct Examination

(Continued)

By Mr. Holman:

Q. With reference, then, to the first item, "Labor, November 22, 1944, to November 15, 1945, Inc."; that's inclusive, is it not? A. Right.

Q. You got that item from what source?

A. From the payroll. [2174]

Q. And that is what amount?

A. \$49,323.62.

Q. Then with respect to item 2, the payroll taxes you yesterday detailed, what was that amount?

A. \$2,219.56.



(Testimony of Elizabeth Callahan.)

Q. And the next item of \$51,543.18 is what?

A. Rental of equipment from H. H. Walker.

Q. No; the next item, \$51,543.18, shown on that compilation, what is it?

Well, that's not an item; that's a total.

Q. Of what? A. Of 1 and 2.

Q. Then the next item, rental of equipment, H. H. Walker, Inc., comes from what?

A. From these bills from H. H. Walker.

Q. And the amount of that? A. \$4,708.33.

Q. Then the next item, rental of equipment of Macri and Company, and the figures were derived how?

A. They are derived from the O.P.A. book, which prices prevailed at that time.

Q. And what's the total of those?

A. \$2,920.00.

Q. The next item, 5, the amount is what?

A. \$8,750.00. [2175]

Q. And I believe you testified yesterday you had a source for that; what was your source?

A. That's Martin & Sons sub-contract price.

Q. Do you have that in the file?

A. Yes, I do.

Q. Item 6 is what? A. \$571.56.

Q. And what do you have in the file on that?

A. Potlatch yard bills; it is for nails, wire, and miscellaneous small material.

Q. Then for each of the other items down to and including item 11, what is your supporting data for that?

A. I have the bills and cancelled checks.

(Testimony of Elizabeth Callahan.)

A. And what are those; will you call the figures?

A. Item 7, Seattle Steel Company, \$1,191.68, part rental and part purchase.

Q. Item 8, Ropes, Inc.; wire? A. \$109.57.

Q. That's purchase.

A. Item for Yakima Hardware Company, wire and miscellaneous, \$86.60; that's purchase. Pioneer Sand and Gravel Company, Sealcure and freight, \$679.76, purchase and freight; Northwest Engineering Company, rental, \$781.21, rental.

Q. Now, with respect to item 12, what was your supporting data on that? [2176]

A. Ray Shingshang, cancelled pay vouchers, pay checks.

Q. Item 13, what's your supporting data on that?

A. I have the bills and cancelled checks.

Q. That's how much? A. \$259.20.

Q. Then the total of the items expended that you've detailed is how much? A. \$72,759.98.

Q. The next item, sub-contract price on quantities of Bureau final estimate number 16, how do you arrive at that item, Miss Callahan?

A. Well, number 12—oh, you mean all of it?

Q. Pardon me?

A. Do you mean all of it?

Q. No; how do you arrive at that item of \$43,135.17?

A. Well, the detail is down below, the sub-contract price and the final quantities on the final estimate 16.

(Testimony of Elizabeth Callahan.)

Q. Then when these numbers are shown, number 12, what does that number refer to?

A. That's item 12 on the Bureau of Reclamation estimate.

Q. And it is taken from number 16 each time, the final estimate, is it?           A. That's right.

Q. And number 13 is item 13?

A. That's right. [2177]

Q. 15 and 16 the same way?

A. That's right.

Q. Are those the amounts received by Macri & Company at the sub-contract prices in the sub-contract entered into between Macri and Company and M. C. Schaefer, Concrete Construction Company, these prices that you carried, \$28.00; 2 cents per pound; \$35.00; and 3 cents per pound?

A. They are the sub-contract prices, yes.

Q. Now, deducting the amount of the sub-contract prices for the quantities shown by those items in the final estimate left a balance of how much expenditure over the amount covered by the sub-contract items?           A. \$29,624.81.

Mr. Holman: You may inquire.

Mr. Olson: Your Honor, in order to intelligently examine Miss Callahan on the exhibits put in on lumber, it is going to require some examination of those vouchers that have been introduced. I'm wondering if counsel hasn't got a witness he can proceed with so that Miss Callahan will be subject to cross-examination on that in the morning?

Mr. Holman: Is your Honor going until 4:30 tonight, or 4?

(Testimony of Elizabeth Callahan.)

The Court: I had planned to go until 4:30.

Mr. Holman: Well, except for this witness, your [2178] Honor, and possibly one more, I'm through with my case.

Mr. Olson: Have you got any other witness ready to go on?

Mr. Holman: No, I think not.

The Court: If you're that near closing, I have no objection to adjourning. I assume it will take a day to argue this case. I wanted to be sure and get through this week.

Mr. Olson: I wonder if Mr. Hawkins and Mr. Ivy have anything?

Mr. Hawkins: The only thing I have to offer is the assignment which is in the hands of the Clerk. The only materiality with respect to that assignment is with respect to the issues drawn between Macri on the one hand and Goerig and Philp on the other. If I recall correctly Mr. Holman stipulated that if DeWolf Henry sent a letter with the copy of the assignment stating it was a copy, that that could be admitted, and that is here, has been since the 28th of February, and I'll offer that in evidence at this time.

The Court: Well, I don't know that that would be in order now unless counsel has no objection to it, but what I'm trying to ascertain now is the probable duration of the trial here.

Mr. Hawkins: That's the only evidence I [2179] have to offer in this case.

The Court: Do you have any evidence to offer?

Mr. Ivy: No, we haven't, your Honor.



(Testimony of Elizabeth Callahan.)

The Court: And how long will your rebuttal take?

Mr. Olson: About a day, your Honor. Do I understand that counsel expects to be through about noon tomorrow?

Mr. Holman: I think so. This detailed information is virtually the end of my case.

The Court: Well, I appreciate the fact that it would be difficult to cross-examine here unless you have some general matters you might want to cross-examine on.

Mr. Olson: The only thing the witness has testified to, your Honor, is this lumber and accounting, and both of them are based on some detailed documents that I would like, particularly the lumber records, to look at. I could ask a couple of questions.

Mr. Holman: May I pass up a copy of our trial brief? I have served counsel. It came in this afternoon, finally typed.

### Cross-Examination

By Mr. Olson:

Q. Miss Callahan, when did you first go to work for Mr. Macri?

A. The last of November in '44.

Q. November, 1944? [2180]

A. Toward the latter part.

Q. And you're still working for him?

A. That's right.

Q. Now, showing you defendant Macri's Exhibit 105, do you state, Miss Callahan, that you

(Testimony of Elizabeth Callahan.)

actually remember of having mailed that to the Concrete Construction Company, the original of that letter?      A. Yes, I do.

Q. What is there that brings to your mind the mailing of it?

A. Because it's a corrected statement of this one of July 10. After I had mailed the statement of July 10 there were some additional garnishment amounts came in, I guess; for instance, on the Collucio matter there was a court cost and then there was interest on tax, and I believe there was one other charge at Sunnyside, sixty-one dollars and something, so it was necessary for me to make a corrected statement and send it in in order to add those statements.

Q. That would bring to your mind the making of that statement, but what is there that recalls to your mind the depositing of them in the mail box?

A. I don't usually drop them in the mail box. I put them in my mail basket, and when the mail man comes around he picks them up. [2181]

Q. Do you remember the mail man picking that up?

A. It was September 10—do I remember the mail man picking up that particular envelope?

Q. That's what I want to know.

A. I'm afraid I don't.

Q. The only thing you have to say is you remember making it up for that purpose?

(Testimony of Elizabeth Callahan.)

A. Well, the same way that I mail any of my mail. I know it was mailed; I don't know it got there.

Q. Well, how do you know that letter was mailed?

A. Because I mail my mail every day.

Q. I thought you said you put it in a box or basket and the mail man picked it up?

A. That's the same as mailing it.

Q. Right there in the office? A. Yes.

Q. You didn't deposit it in the United States mail deposit?

A. I gave it to the United States mail carrier.

Q. Did you hand it to him?

A. I hand it to him every day.

Q. And you have no particular recollection as far as this letter is concerned, Exhibit 105, do you, Miss Callahan?

A. You mean that individual letter?

Q. Yes. A. No. [2182]

Q. Now, handing you Macri's identification 104, that identification, as I understand it, has all of the detail from which you made up compilations 101 and 102? A. That's right.

Q. Now, your compilation 101 shows what total board feet of lumber?

A. It shows a separation, and now you're asking for the——

Q. On the total, on the end, yes.

A. That's what I'm talking about; that there is a separation of the square feet and board feet.

(Testimony of Elizabeth Callahan.)

Q. Well, what board feet, first.

A. On this one it is 116,355.

Q. And on 102 you show how many board feet?

A. 117,155.

Q. And on 101 you show how many square feet?

A. 3456.

Q. 3456? A. Yes.

Q. And on 102 you show how many square feet?

A. 2656.

Q. 2656? A. That's right.

Q. And on 102 that figure square feet is shown as plywood; 102 is the one that I have in my hand, shown as plywood? A. That's right. [2183]

Q. And that is plywood, is it?

A. I believe it is; it was explained to me that plywood was figured in square feet, not board feet.

Q. Well, I say, that figure is plywood, is it not?

A. I believe it is.

Q. And on 101, the other exhibit, is the item there shown as square feet, under total, is that likewise plywood?

A. I'm not sure about that. In one place on the bill it is marked square feet, but it doesn't say it is square feet of plywood.

Q. You're not able, then, are you, Miss Callahan, to explain why the totals on the two exhibits 101 and 102 are not the same, either as to square feet or board feet?

A. I believe the over-all is the same.

Q. Upon what do you base that?

A. Base what?



(Testimony of Elizabeth Callahan.)

Q. That the over-all total is the same; what do you mean by that?

A. Well, it is a question of whether you're going to separate square feet and board feet.

Q. Well, can you do that?

A. I can only indicate it from what is on the bills.

Q. Then you don't know whether the over-all total is the same or not?

A. Yes. [2184]

Q. Is it?

A. I believe it is.

Q. How many square feet in a board foot?

A. I'm not testifying as to that. I'm testifying to what is written on the bills. I'm not a lumber expert.

Q. Why don't the totals on the two exhibits total the same?

A. Because of that item that is marked square feet.

The Court: Which one do you have there?

A. 102. This 640 is marked square feet, and it doesn't say whether it is plywood, or whether it is just square feet.

Q. You say it is marked square feet. It is marked that way on what?

A. On the invoice.

Q. On the invoice; well, did you make up 101 and 102 from the same invoices?

A. Yes.

Q. So that you had the same invoices exactly in making up 101 as you did in making up 102?

A. No, I made up 101 from the detail sheet 102; it's merely made up by the month.

(Testimony of Elizabeth Callahan.)

Q. Well, now, why don't the totals, why aren't they the same?

A. Well, I would gather that I made a mistake.

Q. Well, are you able to say where the mistake is?

A. Yes, I think I can show you. Right here. I believe it [2185] is in this 640 square feet that is not designated as to plywood or what kind of wood.

Q. Are you referring to——

A. Well, I think I have added one of the square feet in the board feet. It looks like it.

Q. Well, it appears, then, that these compilations, 102 and 101, one or the other, or perhaps both, are not an accurate representation of the material contained in the invoices which you now hold, isn't that so?

A. I think you will find they will coincide with the invoices as to amounts and sizes.

Q. You think each of these will coincide with the invoices on hand, even though they arrive at different totals?

A. It is possible there is a mistake on the total.

Q. Now, have you got the invoices to support the item that you show in November, 1944, of 14,688 board feet from the Walton Lumber Company?

A. What is the date?

Q. November, 1944.

A. Yes. Does it give the invoice number? Yes.

Q. May I see it please?

A. 14,688 feet; that's what you're asking about, is it not?

(Testimony of Elizabeth Callahan.)

Q. Yes, the items shown on November, 1944.

A. That's invoice 1452.

Q. The invoice which you have handed me you have charged to [2186] job 1062, have you not, Miss Callahan?

A. Yes.

Q. They say on the top, sold to Burnsted & McCarthy?

A. That's right.

Q. Now, is it not a fact that Burnsted & McCarthy were on job 1068, and not 1062?

A. They did ordering for both jobs.

Q. I say, isn't it a fact that Burnsted & McCarthy were working on job 1068?

A. They were on that job; as to what their duties were, you would have to clarify that with Mr. Macri; I don't know.

Q. And we would have to clarify with Mr. Macri where this lumber went to, would we not? Both of them show "Sold to Burnsted & McCarthy, Prosser, Washington."

A. I believe it is signed for by a Concrete Construction Company employee, John Klugg.

Q. Well, do you know whose writing this is?

A. Which one.

Q. The one you just mentioned, John Klugg, Concrete Construction Company?

A. I presume it's his handwriting.

Q. Well, do you know it is his writing?

A. I don't know that it is or isn't; it says "Received by John Klugg."

Q. Who wrote that? [2187]

A. I suppose he did. This other writing is Mr. Burnsteds.

(Testimony of Elizabeth Callahan.)

Q. In other words, you don't know anything about where this lumber went except what appears on this document, do you, Miss Callahan?

A. That's right, and where it is charged to.

Q. For all you know personally, other than what appears on this document, that lumber could well have gone on 1068?

A. I don't believe so. We paid the bills on 1062.

Q. I say, as far as you know, Miss Callahan, other than what appears on the face of these two documents, these invoices dated November, 1944, showing it is sold to Burnsted & McCarthy, except for what is shown on there, that lumber may have all gone into 1068, as far as you personally know; I'm not asking you what you believe.

A. No, I was told to charge it to 1062.

Q. Well, then, except for what you were told by somebody else, and what appears on the face of these two invoices, that lumber may have well gone into 1068, as far as you personally know?

A. As far as charging it to the job, I only know what is written on it, and what I was instructed to do.

Q. You don't know whether this lumber was delivered to 1062?

A. Except for the packing slip.

Q. Were you working for the Macri Company on November 18, 1944? [2188]

A. Right about that time I went to work.

Q. About the 18th?

A. Right around in there; I couldn't tell you the exact date. It was the latter part.



(Testimony of Elizabeth Callahan.)

Q. And you don't know whether John Klugg worked for Mr. Macri on 1068 or not?

A. He worked for Concrete Construction Company, didn't he?

Q. I say, do you know whether or not he worked for Mr. Macri on 1068, or not?

A. I don't believe he's on our payroll.

Mr. Olson: Your Honor, I would like to have an opportunity to go through these, on the rest of them.

The Court: Very well. I want to direct counsel's attention to these two exhibits that seem to be duplicated in part, that is, Macri's 99 and Macri's 76, and the Clerk's check indicates to him that the vouchers in 76 are the same as the copies shown in 99. Now, if you wish to withdraw one of these, Mr. Holman, after checking them, you may do so. The Court will adjourn until tomorrow morning at 9:30.

(Whereupon, the Court took a recess in this cause until Wednesday, March 19, 1947, at 9:30 o'clock a.m.)

Yakima, Washington, Wednesday, March 19, 1947  
9:30 o'Clock A.M.

(All parties present as before, and the trial was [2189] resumed.)

Mr. Holman: Your Honor, I have checked Macri's 76 and Macri's Exhibit 99, and I find on 76 the originals are true originals of the carbons on 99.

(Testimony of Elizabeth Callahan.)

Now, I've forgotten which way your Honor suggested substituting. This part is duplicate, and the upper part is check.

The Court: I think, then, the one that has both on it should be retained.

Mr. Holman: Then I'll withdraw 76 and return it to counsel, as it is from their file.

The Court: All right.

Mr. Olson: Your Honor please, I have served counsel for all parties with our brief, and including a supplemental brief; in other words, our brief and supplemental to the brief will be in the file simultaneously and I would like to hand your Honor, then, our memorandum of authorities.

The Court: All right.

### Cross-Examination

(Continued)

By Mr. Olson:

Q. Miss Callahan, I'll hand you Macri's identification 104 again. Now, would you look at 104-58, you will notice on each one there is a small number. Do you find that one? A. Yes.

Q. Now, that exhibit shows the material was sold to whom? A. It says Burnsted & McCarthy.

Q. And at what address?

A. 712 North 49th Street, it says here.

Q. Now, the slip attached to that bears what signature? A. I don't know; I can't read it.

Q. Well, it is R. Kirk, isn't it?

A. I don't know whether it is a K or B; I can't read it.

(Testimony of Elizabeth Callahan.)

Q. You didn't find that name on the payroll of 1062, did you, on either Macri's payroll or Schaefer's payroll?

A. I would have to look. I don't remember every man on the payroll.

Q. What I want to know, Miss Callahan, is just how and by what notation on any of that particular identification it was that made you include it on the list of lumber submitted to 1062.

A. Well, of course, the packing slip is marked Roza Project, but these slips were given to me by Mr. Burnsted, who was ordering and expediting lumber, and there is writing, "Charge 1062."

Q. And the reason you charged it to 1062 is because Mr. Burnsted told you to?

A. Because Mr. Burnsted had marked it.

Q. Yes, because Mr. Burnsted wrote in pencil on the face of the exhibit "Charge to 1062, schedule 1."

A. Mr. Burnsted went over these bills with me.

Q. Just a minute; I'm not asking what Mr. Burnsted did. I [2191] say, the reason you charged to 1062 was because Mr. Burnsted wrote that notation "Charge Sunnyside number 1, 1062"?

A. In addition to the fact that he told me to.

Q. And the fact that he told you to?

A. Yes.

Q. All right. Yes, now, what does that show as to the destination, still referring to 58 on the face of the bill that you made up your compilation, exhibits 102 and 101 from, what destination is shown on Exhibit 104-58?

A. Prosser.

(Testimony of Elizabeth Callahan.)

Q. Prosser, Washington. And that is the address of 1068, is it not? A. That's right.

Q. And the address of 1062 was Sunnyside, Washington; right? A. That's right.

The Court: How much lumber was in that one, that 58?

Q. According to the—well, how much lumber does that include, Miss Callahan?

A. 12,217 feet.

Q. Now, your item number 72, 104-72, would you get that one, please? Now, that's billed to whom? A. Burnsted & McCarthy. [2192]

Q. At what address? A. Prosser.

Q. Prosser, Washington. It says "Destination, Prosser, Washington," does it?

A. No, it says "address."

Q. Address, Prosser, Washington, and that address is the address of 1068, is it not?

A. That's right.

Q. And Burnsted & McCarthy had charge of 1068 for you, did they not?

Mr. Holman: Just a minute. Your Honor, objected to as not proper cross-examination.

The Court: Overruled.

A. They were over there.

Q. Yes. A. Mr. Burnsted ordered lumber.

Q. Now, that covers how much lumber?

A. 14,688.

Q. Now can you find number 2? A. Yes.

Q. Do you have that, Miss Callahan?

A. Yes.



(Testimony of Elizabeth Callahan.)

Q. Now, what lumber does that include?

A. What kind, you mean?

Q. What lumber does it include; what quantity?  
42 board [2193] feet, is it not?

A. That's right.

Q. And it consists of one piece of lumber 3 by  
12 by 14, is that right?

A. There's another figure here, to.

Q. Well, that invoice you charged to 1062, did  
you not? A. Yes.

Q. I don't think the reporter can hear you, nor  
anybody else, Miss Callahan.

A. Yes, it says "Sunnyside, Washington."

Q. It says "Sunnyside, Washington" on it?

A. That's right.

Q. And for that reason you charged it to 1062.  
You made no effort, did you, Miss Callahan, to  
ascertain whether or not that lumber was used for  
forms or whether it was used for other jobs on  
1062 by Macri and Company?

A. I don't think I understand your question.

Q. I say, in making up this compilation, 102  
and 101, you simply were endeavoring from these  
invoices and what Mr. Burnsted told you to list  
all of the lumber that went to 1062, irrespective  
of the purpose for which it was to be used?

A. No, that isn't exactly right. I checked this  
with Mr. Macri also. I know we didn't get all the  
lumber, but it is all the lumber that I could find  
slips for. [2194]

(Testimony of Elizabeth Callahan.)

Q. Well, that 3 by 12 by 14, did you ascertain that that piece of lumber three inches thick, twelve inches wide, and fourteen feet long was used in making forms for concrete structures?

A. I wouldn't remember that particular piece of lumber.

Q. Well, did you make any effort to ascertain whether or not the lumber that you have shown on this compilation is form lumber? That's what I'm trying to get at.

A. No; I was asked to record the lumber that was delivered to 1062.

Q. And your compilation of 102 and 101 includes not only the information from those invoices, but also is the result of oral instructions and information given to you by both Mr. Macri and by Mr. Burnsted, true? A. The bills are here.

The Court: Read the question. See if you can't answer the questions.

A. I was instructed by them, corrected and checked, yes.

Q. Is your answer to my last question yes, Miss Callahan?

A. Yes, I received oral instructions.

Q. And the exhibits 101 and 102 includes information which you received orally from Mr. Burnsted and Mr. Macri?

A. Well, I find that rather hard to answer.

Q. Well, you made up 101 and 102, did you not? A. Yes, I did. [2195]

(Testimony of Elizabeth Callahan.)

Q. Now, in making it up, did you rely in addition to the invoices which you now hold, 104, on information which was given to you orally by Mr. Macri and Mr. Burnsted? A. Yes, some of it.

Q. Yes. Now, can you find number 6, 104-6? A. 104-6.

Q. Now, that is 206 board feet? A. Yes.

Q. And what notation is there on the bill itself to indicate that that is chargeable to 1062?

A. It is signed for by Mr. Staples; is that what you mean?

Q. Is that what you relied on, the fact that it was signed for by Mr. Staples?

A. In addition to the fact these bills were all filed under 1062.

Q. You didn't ascertain, did you, Miss Callahan, that that lumber was form lumber on 1062?

A. I didn't know whether it was form lumber or not.

Q. You wouldn't be able to say whether or not that lumber was purchased for the building of Macri's office on the yard?

A. I wouldn't know that.

Q. All right; now would you find number 10?

A. Yes.

Q. Do you have that? [2196] A. Yes.

Q. Now, you say that there was 360 and 96 board feet delivered, do you not, in your compilation 101, based on those numbers? A. Yes.

Q. You show it under dates of May 18 and May 31. Actually it's all shown on the one invoice, is it not, dated May 18? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. In other words, there is no invoice to support the May 31 date which you show on your compilation, 101 and 102, but they are in fact both shown on the invoice for May 18, 1944; that's correct is it not? A. This one says May 31.

Q. Well, that's not a charge, though, is it? That's not a delivery. A. No.

Q. On your exhibit 101 and 102 you show 360 board feet on May 18, and 96 board feet on May 31, is that not so, Miss Callahan? A. Yes.

Q. And as a matter of fact, those two items are both shown on an invoice dated May 18?

A. That's right.

Q. Now, go to your May 31 invoice there, and what does it [2197] show? A. It is a credit.

Q. Of how many feet; how many board feet of lumber? A. 380.

Q. Now, where do you show that credit on 101 and 102? A. I don't.

Mr. Holman: What is that sub-number?

Q. What is the sub-number of the memorandum credit? A. 104-12.

Q. 104-12. So that in your compilation, then, Miss Callahan, it is a fact, is it not, that you show delivered to 1062 360 board feet and 96 board feet, or a total of 456 board feet, whereas your actual files from which you've made up this compilation show that 380 feet of that lumber was credited back?

A. It shows as being delivered; it should show as being credited.



(Testimony of Elizabeth Callahan.)

Q. And your compilation does not show that credit, does it? A. That's right.

Q. Now, on your number 18, would you find that? A. Yes.

Q. That is 320 board feet of two by eight, right? Or it includes 320 board feet of two by eight?

A. Yes.

Q. And also includes 304 board feet of two by six? [2198] A. Yes.

Q. That again is lumber used for building forms on 1062, is it, Miss Callahan, or do you know? A. I wouldn't know form lumber.

Q. It also includes, the same exhibit, does it not, Miss Callahan, includes 53 board feet consisting of one piece of lumber, which is four by eight?

A. That 20 feet long, is that what you mean?

Q. Well, do you have a four by eight there, 53 board feet? A. Yes, I think that's 53.

Q. You charged that on your compilation to this 1062, also, did you not?

A. Yes; it was delivered to 1062.

Q. Matter of fact, you charged all the lumber shown on that slip there to 1062, did you not?

A. Well, let's see. Yes, that's lumber Mr. Ashley ordered.

Q. That's lumber Mr. Ashley got?

A. Yes.

Q. All right. Now, can you find your number 21? A. Yes.

(Testimony of Elizabeth Callahan.)

Q. And that consists of a four by eight and a three by ten, does it not? A. Right.

Q. Signed for by whom? A. Sheffield.

Q. Curtis Sheffield? A. C. H. Sheffield.

Q. He was the one that they testified to was the fine grader, or did you hear that testimony?

A. I don't know about that.

Q. Did you check him on your payroll, or do you recall? A. I don't recall that.

Q. All right. Let's see, that was 88 board feet altogether, was it not? A. Yes.

Q. Now, check your item 26. What piece of lumber does that include?

A. That includes 24 pieces.

Q. Of what? A. Two by six.

Q. Two by six? A. Yes.

Q. No one have signed for that lumber, have they? A. No.

Q. What was there to indicate to you upon looking at that slip that it went to 1062 and not 1068? How did you ascertain that?

A. It was charged to 1062 on the books.

Q. There's nothing on the invoice to indicate where that lumber went to, is there? [2200]

A. Not on this slip.

Q. It's not signed by anybody; simply shows that it was purchased in Sunnyside?

A. That's right.

Q. And that's how many board feet?

A. I don't know; I'd have to figure that out. 384, it would be.

(Testimony of Elizabeth Callahan.)

Q. Did you reduce that bill to board feet yourself in making your compilation?

A. I did not.

Q. Where did you get your 384 board feet when you figured that up?

A. I got a man to do it for me.

Q. I see, so in making your compilation, then, 101 and 102, as far as those items are concerned, you took that bill, had somebody else reduce it to board feet, and then you put his figure on your compilation?

A. That's right.

Q. And each time where the board feet was not shown on the bill that's what you did?

A. That's right.

Q. Now, will you get your item number 32?

A. Yes.

Q. That takes in 570 board feet, consisting of 21 pieces of two by ten? [2201]

A. Right.

Q. And what is there to indicate that that went to 1062, as far as the bill is concerned?

A. It was OK'd by Stickney.

Q. May I see where his name appears there? That is the W.E.S.?

A. M.E.S.

Q. Or M.E.S.?

A. That's right.

Q. You don't know, again, what that lumber was used for, do you, Miss Callahan?

A. No.

Q. Now, would you get your number 47?

A. Yes.

Q. The invoice on that is from whom?

A. Sequim Lumber and Supply Company.

Q. And its charged to whom?

A. Macri and Company.

(Testimony of Elizabeth Callahan.)

Q. At what address?

A. Well, it is a carload of lumber that's charged on the bill here by railroad spur.

Q. And where was that delivered, if you can tell from that bill?

A. It is lumber that came from Macri Development Company.

Q. It was delivered to the Macri Development Company in [2202] Seattle, then? A. Yes.

Q. And then you have charged in your compilation certain portions of that bill to 1062, have you not? A. Yes.

Q. And from whence did you get the information that directed you to charge the portion of it which you did to 1062?

A. Well, it is a book entry on the Macri Development books; "charge to Sunnyside."

Q. And who made the book entry?

A. The auditor.

Q. And where did he get the information?

A. From the files and bills.

Q. What is there, by looking at the—I'm referring to 104-47, to indicate where that lumber went, other than to the Macri Development Company?

A. This slip that's attached to it.

Q. No, I'm asking you on 47.

A. They're all part of 47, are they not?

Q. On the pink one upon which the number 47 is written in ink, what is there on that slip to indicate what part of that lumber went to 1062?



(Testimony of Elizabeth Callahan.)

A. There's nothing on that slip; that's why this is attached to it.

Mr. Holman: Just a minute; may it please the Court, [2203] she has a right to finish her answer.

The Court: Read the question and answer.

(Whereupon, the reporter read the last previous question and answer.)

The Court: That's an answer to the question, Miss Callahan. Answer counsel's questions, and then if there are explanations to make, you can leave it to Mr. Holman to bring out the explanations. Just answer the questions directly.

Q. (By Mr. Olson): Now, the portion you refer to as being attached is a white slip and a yellow slip, right? A. Yes.

Q. And those are pencil notations?

A. That's right.

Q. And who made those?

A. Whoever worked in that office at the time.

Q. You don't know who made them?

A. I didn't work in that office at the time.

Q. You don't know where they got the information to make up the pencilled notations? You don't know where they got that information?

A. No.

Q. Whether somebody told it to them or where it came from? A. No. It is part of the file.

Q. And when you made up your compilation, 101 and 102, you [2204] then charged and placed on that compilation that portion of the lumber shown

(Testimony of Elizabeth Callahan.)

on the pink invoice 104-47 indicated in pencil on the attached yellow and white notations, did you not?

A. That part of it that's charged to Sunnyside, yes.

Q. And that's where you got your information?

A. That's right.

The Court: What is the quantity charged to 1062 on that?

Q. Can you tell from that notation the quantity that was charged; by looking at the invoice can you tell, Miss Callahan?

A. No, part of it is in square feet and part of it is in board feet. There is 9900 board feet, and 800 square feet.

Q. Now, look at your identifications or your numbers 104-49 and 104-50.

A. Yes.

Q. Now, whose notation is that?

A. Mr. Burnsted.

Q. Mr. Burnsted; and those two identifications are the source of your information in compiling 101 and 102 and showing lumber from 1068 to 1062, is that what that is?

A. Yes.

Q. And you know nothing about that except what Mr. Burnsted wrote on those two slips of paper? [2205]

A. That's right.

Q. Did he make both pencil and the green crayon notations?

A. No, the pencil notations are the truck driver's; the green crayon, Mr. Burnsted's.

Q. When did Mr. Burnsted make the green crayon notations?

(Testimony of Elizabeth Callahan.)

A. I don't know; he brought me these slips from Prosser when he came.

Q. Isn't it a fact that Mr. Burnsted went over those bills afterwards and made these pencil notations to charge one here and one someplace else?

A. No, that's not true. He brought them to me in this manner.

The Court: What's the quantity on those two?

Q. What is the quantity, Miss Callahan, shown on those two? A. There's 640 square feet.

The Court: 640, did you say?

A. Square feet. I'll have to add the board feet. 2790 board feet.

Mr. Olson: Your Honor, I should like to offer those identifications into evidence.

Mr. Holman: I join, your Honor.

The Court: Beg pardon?

Mr. Holman: I have no objection to 104 being admitted in its entirety. [2206]

The Court: I'm not clear as to whether counsel's offer refers to all of 104, or just the sub-numbers that you have taken up.

Mr. Olson: I'm offering the sub-numbers that I have taken up, your Honor.

The Court: In cross-examination?

Mr. Olson: Yes.

The Court: Well, now, let's see. Have you got those, or any way of checking with me on the numbers?

Mr. Olson: Yes, I have them, your honor. 104-58, 104-72, 104-2, 104-6, 10, 18, 21——

(Testimony of Elizabeth Callahan.)

The Court: I had 12 there, 104-12. Didn't you have that one too?

Mr. Olson: Oh, that's correct, I do want 12.

The Court: 104-10, and the next is 104-12.

Mr. Olson: Then 18—I'm just reading the sub-numbers, 21, 26, 32, 47, 49, 50.

The Court: That tallies with my notation of them.

Mr. Holman: Your Honor, I would like to offer the whole of the file, so it cannot be torn apart. Counsel went over the file.

The Court: Well, I think if part of it is to go in, probably all of it should. The whole of 104 will be admitted, then.

(Whereupon, defendant Macri's [2207] Exhibit No. 104 for identification was admitted in evidence.)

Cross-Examination  
(Continued)

By Mr. Olson:

Q. Now, do you have a copy of Exhibit 91, that's your compilation of the costs of 1068, Miss Callahan? A. Yes.

Q. And by the way, did you happen to get my copy of that? A. No, I don't think so.

Q. Well, Miss Callahan, in figuring up your labor item, number 1, that was made up from the certified payroll which was identified here in evidence, is that correct? A. Yes.



(Testimony of Elizabeth Callahan.)

Q. And your payroll taxes, your item 2, is a mathematical computation based upon item 1?

A. Yes.

Q. Well, does your item 1 figure, forty nine odd thousand dollars, is that a net amount paid to the men, or is that the gross payment?

A. That's the gross payment.

Q. Well, now, I notice in item 2 you've included your old age benefit taxes, federal unemployment, state unemployment, and the Workman's Act; was any of that deducted from the men?

A. This represents the employer's portion.

Q. Well, then, none of that was deducted from the men, of [2208] item 2?

A. No, not if I understand you correctly. There are deductions, but this represents the employer's payment.

Q. Now, item 3, the rental of equipment from H. H. Walker and Company, do you have the vouchers on that?

A. Yes, I do.

Q. Where are they? Do you have them?

A. Yes, I do.

Q. May I have them, please?

A. Do you mind if I take my checks out?

Q. I'd rather they be left all together.

Mr. Holman: Well, then, let's leave them the way they are and have them marked for sub-numbers.

Mr. Olson: We're willing to examine them right here in court, in the presence of counsel.

Mr. Holman: I'm perfectly willing that counsel examine them.

(Testimony of Elizabeth Callahan.)

Mr. Olson: It won't do a great deal of good for me to examine them. I'd like to have Mr. Hendershott do it.

Mr. Holman: Then I'd like them marked as sub-numbers.

Mr. Olson: I'll set it right here, and counsel can have them marked if he wishes. As I understand, that item 3, Miss Callahan, represents actual money paid out [2209] as shown by the invoices which you've just now handed me, to H. H. Walker, Inc.?

A. There is still an outstanding balance on Mr. Walker; is that what you're referring to?

Q. (By Mr. Olson): In other words, it's not yet all paid? A. That's right.

Q. But what I'm getting at is, you've been billed for that amount, is that right?

A. That's right.

Q. That's not figured on O.P.A. rentals, but is figured on actual bill?

A. Oh, it is actual bill from them. I think they're O.P.A. prices, all right.

Q. Now, on item 4——

Mr. Holman: Pardon me just a minute, counsel. May I have this marked for identification?

(Whereupon, folder of bills, checks, etc., on item 3, specification 1068, was marked defendant Macri's Exhibit No. 106 for identification.)

Q. (By Mr. Olson): Miss Callahan, your item 4, rental of equipment owned by Macri and Company, that figure is not a book item of Macri's books, as I understand it? A. Is not a book item?

(Testimony of Elizabeth Callahan.)

Q. You did not get that off of Mr. Macri's books any place, but got it out of an O.P.A. book? [2210]

A. Well, the prices are out of the O.P.A. book.

Q. Well, that's where you got the entire item 4, isn't it, as far as the amounts are concerned?

A. No, it was given to me by Mr. Burnsted, which is part of the equipment charged to concrete work.

Q. Did Mr. Burnsted give you these figures, \$2000.00 on a long wheel base flat bed truck?

A. No, he gave me the equipment and I put down the figures.

Q. So I'm asking you, then, as far as the figures are concerned, they didn't come out of Mr. Macri's books, but came out of an O.P.A. book?

A. Well, that was made up a long time ago, and it is in Mr. Macri's books; is that what you mean?

Q. You mean that figure does appear in Mr. Macri's books, then, \$2000.00? A. Yes.

Q. Do you have that book with you?

A. Yes, I believe we have. I'm not sure.

Q. Would you produce that, please?

A. I don't have the books here in the courtroom; is that what you mean?

Q. I understood you said yesterday when this Exhibit 91 was admitted that the books and records from which the same was made were here available for our inspection. You said that, didn't you, Miss Callahan? [2211]

A. I said they could be produced.

Mr. Holman: They're over at the hotel. I can send for them if necessary, Mr. Olson.

(Testimony of Elizabeth Callahan.)

Q. We would like to check that item. Did you get the figure out of the O.P.A. book yourself, or did someone else do that?

A. I was trying to think—I think Mr. Mackel helped me with that.

Q. Who? A. Mr. Mackel, our accountant.

Q. Is he here? A. No.

Q. He was here, wasn't he?

A. Yes, he was.

Q. Well, is he the one that got those figures, then?

A. He helped me find them. That was quite some time ago.

Q. Do you have the O.P.A. book from which you got those figures, here? A. Yes.

Q. Now, your item 5, Miss Callahan, Martin & Son, ready mixed concrete, \$8,750.00; from where did you get that information?

A. Well, that's the amount of their contract.

Q. Do you have their contract here?

A. I believe I do. I don't have it here, right at this [2212] moment, but I have it in Yakima.

Q. Well, how did you arrive at that figure?

A. I do have the file with all their statements and checks, their progressive monthly payments; is that what you mean?

Q. Well, I'm just trying to find out where you got the figure, whether the contract was a lump sum contract, or——

A. No, it was paid progressively.



(Testimony of Elizabeth Callahan.)

Q. Well, would you get us those figures, Miss Callahan? And your Potlatch Yards, nails, wire, and so forth, \$571.56, do you have those figures here, invoices? A. Yes.

Q. The folder that you have handed me last, marked item 5, 1068, refers to item 5 on your Exhibit 91? A. Yes.

Q. And the same thing with your folder marked Item 6, Manila folder, that refers to item 6 of your Exhibit 91? A. Yes.

Q. Now, item 7—item 8, is——

A. Ropes, Inc.

Q. And the supporting data on that is included in the manila folder, item 8, 1068?

A. Right.

Q. Now, your item 9, do you have a folder for that? [2213] A. Yes, I have.

Q. That's marked item 9, 1068. Do you have item 7? I did skip item 7, Miss Callahan.

A. Yes, I do.

Q. That's marked item 7, 1068. Now, what is your next item there? A. Item 10.

Q. Item 10. Do you have 11, 12——

A. Yes.

Q. What is that?

A. Ray Shingshang, placing re-enforcement steel.

Q. Have you got another one? Item 13. Does that include the data on all of your items, now? Miss Callahan, on item 12, Ray Shingshang, placing re-enforcement steel, that represents a total of the

(Testimony of Elizabeth Callahan.)

checks which are included in the folder marked item 12?        A. Yes.

Q. Do you know whether or not he was employed under a contract?

A. No, he was sent over there to place the reinforcing steel. I called him myself.

Q. Pardon?

A. I called him myself. He was working for us elsewhere, and when it was time to place that steel, he was sent over.

Mr. Olson: Now, your Honor, last night there was [2214] entrusted to me Exhibits 91, 101 and 102. Your Honor now has, I think, 91, and I am now returning 101 and 102. That's all the cross-examination.

The Court: All right.

(Whereupon, folder of bills, checks, etc., on item 5, specification 1068, was marked defendant Macri's Exhibit No. 107 for identification.

(Whereupon, folder of bills, checks, etc., on item 6, specification 1068, was marked defendant Macri's Exhibit No. 108 for identification.

(Whereupon, folder of bills, checks, etc., on item 7, specification 1068, was marked defendant Macri's Exhibit No. 109 for identification.

(Whereupon, folder of bills, checks, etc., on item 8, specification 1068, was marked defendant Macri's Exhibit No. 110 for identification.

(Testimony of Elizabeth Callahan.)

(Whereupon, folder of bills, checks, etc., on item 9, specification 1068, was marked defendant Macri's Exhibit No. 111 for identification.

(Whereupon, folder of bills, checks, etc., on item 10, specification 1068, was marked defendant Macri's Exhibit No. 112 for identification.

(Whereupon, folder of bills, checks, etc., on item 11, specification 1068, was marked defendant Macri's Exhibit No. 113 for identification.

(Whereupon, folder of bills, checks, etc., on item 12, specification 1068, was marked defendant Macri's Exhibit No. 114 for identification.

(Whereupon, folder of bills, checks, etc., on item 13, specification 1068, was marked defendant Macri's Exhibit No. 115 for identification.)

Mr. Olson: I may wish to recall Miss Callahan about these afterwards.

Mr. Holman: Counsel, do you want this National Defense marked, or not.

Mr. Olson: I don't care whether it is marked or not, but I want to use it.

Mr. Holman: For identification, Mr. Clerk.

(Whereupon, Title 32, National Defense Chapter 11, Part 1399, was marked defendant Macri's Exhibit No. 116 for identification.)

Mr. Olson: Your Honor, if these identifications have to be sub-marked, why, we're not going to have them in time to do us any good.

(Testimony of Elizabeth Callahan.)

Mr. Holman: Your Honor, I have no objection to Mr. Olson himself using any of the files, just as they are, if he will not part with them to others, and disarrange them. They're in order for the accounting, and that's the only purpose of sub-marking them.

Mr. Olson: I wonder if the United States Marshal [2216] could accompany our accountant and watch him? They're not going to do me any good.

Mr. Holman: That inference is not my purpose at all. They're in line for the bookkeeping set-up of the business, and I'd like to keep them that way, plus the fact that way plus the fact that it's already been shown that it is convenient to refer to a particular paper.

The Court: Well, I think that arrangements could be made to have access to them in the Clerk's room under his supervision. Would that be acceptable?

Mr. Olson: That's fine. I have in mind handing them to Mr. Hendershott and having him go some place right in the courthouse.

Mr. Holman: If they're not taken out of order, Mr. Olson, and you deliver them to Mr. Hendershott for that purpose, I have no objection, but to have them pulled apart——

The Court: It is understood they will be kept in the same order.

Mr. Olson: We'll do our best to keep them in order. We have no desire to disarrange the files.

The Court: Will that be acceptable?



(Testimony of Elizabeth Callahan.)

Mr. Holman: With Mr. Hendershott, your Honor.

The Court: Mr. Granger will be in the office, and he can supervise the inspection of them. [2217]

Mr. Holman: Do you say you may want further cross-examination?

Mr. Olson: I may, yes.

Mr. Holman: Shall I proceed with redirect as far as they've gone, your Honor?

The Court: All right.

### Redirect Examination

By Mr. Holman:

Q. Miss Callahan, I'm referring to exhibit 104, and the sub-numbers, which counsel asked you about. I'll ask you—will you make memo of these and then I want to ask you one question about all of them. Sub-number 58, 72, 2, 6, 10, 12, 18, 21, 26, 32, 47, 49, and 50. Will you tell me which of those have been paid by check of Macri and Company, charged to 1062?

Mr. Olson: Did you say by check to Macri and Company?

Mr. Holman: No, by check of Macri and Company, charged to 1062.

The Court: These are the same ones, 104?

Mr. Holman: Those are the same ones counsel offered, your Honor, for lumber.

Mr. Olson: I'm going to object to that question, your Honor, on the ground that it's asking for a matter that's not the best evidence, and on the further ground that it will be a self-serving statement,

(Testimony of Elizabeth Callahan.)

and not proper [2218] redirect examination, because the witness testified in making up the compilation that she made it up from the data contained in Exhibit 104.

Mr. Holman: But your Honor, this is with respect to items of payment, and it was shown merely for the purpose of the lumber going into the job, the quantity of lumber; the figures were not involved.

Mr. Olson: What figures?

Mr. Holman: The prices were not involved; merely quantities of lumber.

Mr. Olson: Well, I didn't go into prices.

Mr. Holman: No; I say, they're not involved.

The Court: The only thing that could have a bearing here on the question at issue, as I see it, would be some notation on the check designating them as 1062 or otherwise.

Mr. Holman: That's what I have in mind, your Honor.

Mr. Olson: We didn't use the checks, your Honor, in cross-examination, and she didn't use the checks in making up the compilation. She used this Exhibit 104.

The Court: I don't believe there is any evidence that she did use the checks. She didn't draw the checks, did she?

Mr. Holman: I presume she drew them; she didn't [2219] sign them.

The Court: It seems to me it would be self-serving, a notation on the check as to where the segregation should be made. Sustain the objection.

(Testimony of Elizabeth Callahan.)

Mr. Holman: Could Miss Callahan go to get those books, your Honor, if they're at the hotel? You wanted the books, did you not, counsel?

Mr. Olson: Yes, that one that supports that one item.

The Court: I think she said there is one book or some records that she has that are here, and one in Seattle.

Mr. Olson: I didn't understand any was in Seattle. Item 4 on Exhibit 91, the rental, as I understand, that's in the books, and I wanted to see the books on that item.

The Court: Do you have that book here, Miss Callahan?

Witness: No, I don't.

Q. (By Mr. Holman): Where is it?

A. In Seattle.

Q. Those are books of the other company?

A. Part of them, yes.

Q. What company would that be?

A. Well, that would be—no, that would be Macri and Company.

Q. But what books, what job? [2220]

A. 1068.

Q. Are the 1068 books here?

A. Not all of them, no. Not complete.

Q. How much books do you have on 1068 here, Miss Callahan?

A. Just the check register, I believe.

The Court: Well, get what records you have here that counsel wants, and bring them back as soon as you can, Miss Callahan.

Mr. Holman: Your Honor, I have one other witness. The Marshal is out with a forthwith subpoena, and I thought he'd be back by 10:30. He hasn't returned yet. That would be my final witness.

The Court: Well, I can take a mid-morning recess now, and by the time we get through, we should proceed anyway.

(Short recess.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, the Marshal has informed me that he will be unable to serve that subpoena until noon.

The Court: Well, let's proceed, then, with rebuttal, with the understanding that you may reopen and call the witness when he's available. Is there any objection to that? [2221]

Mr. Olson: No, your Honor.

The Court: And also, of course, subject to your right of cross-examination of Miss Callahan.

Mr. Olson: I believe Goerig and Philp have something they wish to put in, at any rate.

The Court: Oh, yes, do you have anything to put in for Goerig and Philp, Mr. Hawkins?

(Whereupon, assignment Macri to Seattle-First National Bank was marked defendants Goerig & Philp Exhibit No. 117 for identification.)

Mr. Hawkins: The first matter I want to take up is this exhibit. This exhibit relates only to the



issues between Goerig and Philp and the Macris. It was stipulated in connection with the cases that started on the 19th of February in this court that we could secure a copy of the assignment from Mr. DeWolf Emory, an attorney in Seattle, and that this copy could be introduced into evidence as the original, upon Mr. Emory's statement that it was a copy of the original, and that that exhibit would be admitted not only as evidence in those cases, but in the cases that are presently being tried before your Honor, and I have this letter dated February 27 on the letterhead of Emory and Howe, attorneys at law in Seattle.

Mr. Holman: You don't want it in the record yet. [2222] Did you want to read the letter into the record?

Mr. Hawkins: Well, I thought I would. I am offering it at this time, and I'm presenting the matter to the Court.

The Court: Well, is there objection to its admission?

Mr. Holman: Yes, your Honor. The objection is this; not as to this being a carbon copy, nor as to it being typed signatures, nor as to the fact that there was an assignment, but basically, the objection is this, your Honor: Counsel interrogated Mr. Macri on the stand with respect to this, even including the matter of whether his notes had been demanded for payment, and he said that they had, several times, as I recall the testimony, but the assignment itself is supplemented by a copy of the complaint and summons as served on Mr. Goerig,

and I think if one goes in, the other should go in too; otherwise the Court doesn't have the story.

Mr. Hawkins: Well, I understand the summons and complaint already is in evidence in those other cases, and of course I have no objection to its being in evidence in this case.

Mr. Holman: Now, the objection we have, and the only objection we have, is that the assignment upon its [2223] face purports to be a complete assignment of all interest which Macri may have against Goerig and Philp under the agreement terminating joint venture, which is in evidence, but under the testimony which Mr. Macri has given it is evident that this is, after all, an assignment to secure an indebtedness, and is not a final or complete sale and transfer, and therefore the effect of the assignment so far as these cases are concerned is the same as if there had been a mortgage and note, and that that had not yet been foreclosed, or if a foreclosure proceeding had been started and had not yet been terminated. So far as the ultimate fact of assignment is concerned, if correlated to the whole transaction at the bank we would have no objection whatsoever, but in the absence of complete proof as to the true relationship with the bank, it is not admissible.

The Court: What does this letter and this document show, that it is an assignment for security?

Mr. Holman: No, just an assignment, your Honor.

Mr. Hawkins: Your Honor, the complaint introduced in evidence shows that the assignment was

given as collateral security. Mr. Macri on the stand, if I recall his testimony correctly, admitted he had executed an assignment to the bank to secure an indebtedness to the bank, and that that indebtedness had not been paid, [2224] although demand had been made.

The Court: Was that in this case?

Mr. Hawkins: No, not in this case.

Mr. Holman: I will stipulate he would testify the same in this case.

The Court: It is stipulated, then, he would testify the same in this case as he testified in the prior cases, as to the assignment; and you're not objecting that it is a copy?

Mr. Holman: No, no; we had that agreement.

The Court: Then I think I should admit it in evidence and determine what weight it should have later.

Mr. Hawkins: I might call your attention to the fact that the assignment is undated and unacknowledged, and Mr. Emory states that is the case with the original. Although these blanks show, that doesn't mean it is not a correct copy.

(Whereupon, defendants Goerig & Philp Exhibit No. 117 for identification was admitted in evidence.)

Mr. Olson: Your Honor, I might possibly save counsel a little trouble. I anticipate that this witness he's got subpoenaed is Mr. John Klugg.

Mr. Holman: That's correct.

Mr. Olson: And I myself served Mr. John Klugg [2225] with a subpoena last night to be here at 1:30 this afternoon.

The Court: Well, he should be here, then, without your serving another subpoena.

Mr. Olson: Counsel can do as he likes about it.

The Court: If you have subpoenaed him, that should be sufficient.

Mr. Holman: That's all I want.

Mr. Olson: I did serve John Klugg with a subpoena last night to be here at 1:30 this afternoon.

The Court: It will be understood, then, that he will be available to either party.

Mr. Olson: Now, your Honor, in connection with our rebuttal, I'd like to offer in evidence Macri's identification 69 and Macri's identification 68. 68 and 69 are both on the letterhead of the Concrete Construction Company, each addressed to Macri and Company, were produced by the defendant Macri out of his files, showing claims presented for additional compensation, and are offered, your Honor, in connection with their testimony that they at all times were dealing under the sub-contract without objection from us.

The Court: Did you show those to counsel?

Mr. Holman: These were produced, your Honor, and identified by Mr. Schaefer on cross-examination. We [2226] object to them for the reason that they are self-serving documents. The only inquiry made of Mr. Schaefer and the answer to which he gave was that with reference to identification 68 he had billed for a total of \$35,745.73, and that with



identification 69 of August 14, 1945, he had billed for \$43,837.25. That was the extent to which the inquiry went. The items presented in these various statements, in these two statements, are items prepared by the use plaintiff, and would be part of their case in chief, and they were here as identifications as part of the case in chief, and were not used, so that the matter of combatting, the time items specified in the two identifications has prevented the defendants from having an opportunity to cross-examine with respect to those entries, if counsel had examined as to them under the identifications as part of his case in chief. Now, to offer them merely for the purpose that they had been used, I submit is not proper rebuttal.

The Court: Is there any objection on the ground of lack of sufficient identification on them?

Mr. Holman: Mr. Schaefer did identify them, your Honor, on my cross-examination.

The Court: Was it shown that the originals were mailed to Macri and Company?

Mr. Holman: They came out of Macri and Company's [2227] file, your Honor. They were produced out of my files. There is no question of those having been received in due course, but I had them identified, may it please the Court, for the particular purpose of giving counsel opportunity to interrogate as to them, either or redirect or in chief, and they did nothing about it, and they were not identified for the purpose of fixing anything except the ultimate amounts, as a matter of billing.

Mr. Olson: I would like to be heard further.

The Court: Well, perhaps I might save a little time by saying that the principal purpose, as I recall, of introducing the checks and check vouchers showing the payment by Macri to Schaefer was to show that the parties continued to deal under the sub-contract, and that Mr. Schaefer had accepted without protest or without comment, presumably, progress payments made from time to time under the sub-contract. That was the main purpose, as I recall, of the introduction in evidence of the checks and check vouchers, because the amount of the payment by Macri to Schaefer has been settled and agreed upon in pre-trial conference. It strikes me that these identifications here should be received in evidence for the same purpose, not as evidence of the amount of extras or the amount of loss, but merely by way of rebuttal in rebutting the evidence that there was dealing throughout [2228] under the sub-contract, and that payments were made and accepted.

Mr. Holman: There is no issue of fact on that. They were received currently; the one, your Honor will note, is undated.

The Court: They simply show that at that date Mr. Schaefer was making claims outside of and beyond the sub-contract, and that is the sole purpose for which they will be admitted.

Mr. Holman: Your Honor, these are subsequent to completion of performance, and they would hark as to payment of those bills that Macri paid, and not with the first set of checks that had to do with the job.

The Court: I understand that, but I think the time element would go to their weight, instead of admissibility. I want it distinctly understood that the Court does not consider they have any probative value as to their contents.

Mr. Olson: Our position has been that we're suing for the reasonable value of our services, and this is in connection with their case that we never submitted them any statements, never submitted any bills, and never complained about the payments being made under the sub-contract.

(Whereupon, defendant Macri's [2229] Exhibits Nos. 68 and 69 for identification were admitted in evidence on behalf of the plaintiff.)

Mr. Olson: Now, I would like to call upon counsel for Macri and Company to produce his copies of the documents entitled invoice 1558, invoice 1539, invoice 1540, invoice 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, all dated January 26, 1945, with the exception of invoice 1548, which is dated February 3, 1945.

Mr. Holman: May I see what they are?

Mr. Olson: Marked defendant's Exhibit 8 to the deposition of Mr. Schaefer taken in counsel Holman's office.

The Court: I don't know that I get just what those invoice numbers refer to.

Mr. Olson: Well, they're just an identification number on the top of each of the letters. Your Honor hasn't seen these, I don't think, or has nothing to go by. I'm just giving them for identification

to Mr. Holman. They are likewise statements Mr. Schaefer submitted to Macri and Company for additional compensation.

Mr. Holman: Did you say that was in the deposition?

Mr. Olson: This was referred to in the deposition, yes, and you had this marked as an identification by the [2230] reporter, but I believe that is my copy, Mr. Holman, and what I'm asking for is your copy, if you have it.

Mr. Holman: Where is it in the deposition?

Mr. Olson: It is marked there.

Mr. Holman: Well, I know, but whose deposition?

Mr. Olson: Mr. Schaefer's deposition. It is referred to on page 14 of the deposition, in one place; page 13.

Mr. Holman: In my copy of the deposition Schaefer starts at page 22 and refers to six documents on page 28.

Mr. Olson: Well, mine on Mr. Schaefer commences at page 1. The reporter on mine has started with page 1 at each deposition, that is, he takes one witness, starts with page 1, when he comes to the next witness he starts renumbering. Oh, yes, it starts on 22, then goes up to 36, and then starts with 1. I think they had a change of reporters on Mr. Schaefer's deposition, so it is numbered 22 to 36 and then it starts with page 1 again, and it is on page 13 of the second number, the second numbered page 13 of Mr. Schaefer's deposition.



The Court: Has there been a previous demand for the production of these documents?

Mr. Holman: No, there has not.

Mr. Olson: But they were marked as an exhibit to [2231] Mr. Schaefer's deposition, and——

The Court: Oh, I see, they were documents that were produced when Mr. Schaefer's deposition was taken.

(Discussion of deposition by counsel.)

Mr. Olson: Well, will you produce a copy of your letter to Mr. McKelvey dated March 14, 1945?

Mr. Holman: Did you demand these? I thought I furnished all that you demanded.

Mr. Olson: And Mr. McKelvey's letter to you dated March 9, 1945.

Mr. Holman: Mr. Olson, I did supply you with all that you made written demand on, did I not?

Mr. Olson: Well, give me the letters.

Mr. Holman: Well, I'm asking you if I didn't?

Mr. Olson: We'll spend less time if you give me the letters. I think you did, Mr. Holman.

Mr. Holman: March 9, from McKelvey. I have that letter. Do you want that?

Mr. Olson: Yes.

Mr. Holman: March 14; here it is.

Mr. Olson: Now, Mr. Holman, do you have the claim, reading the first paragraph of this letter of March 9: "We are enclosing herewith copy of claim presented to us by the Concrete Construction Company, made against Macri and Company." Now, do you have that claim? [2232]

Mr. Holman: I am very much under the impression that that is the one marked Exhibit 68, but I don't know, since Exhibit 69 is August 14, which would be after the date of that letter. I know it was this one I have marked myself, you see, it was sent to our firm, and I marked "file Macri and Company" so that one is an August date.

(Whereupon, Letter McKelvey to Holman, dated March 9, 1945, was marked plaintiff's Exhibit No. 118 for identification.)

Mr. Holman: By the way, you asked for one letter of March 14. There are two letters of March 14, one referring to 1068, and the other 1062. Do you want them both? I think this should be in, too, your Honor, March 12, because it refers to the claim of \$35,745.73, which is Exhibit 68, so I think the letter of March 12 should be part of the correspondence, too, but the point I'm making, Mr. Olson, in asking for a letter of March 14 from me, there are two to McKelvey on March 14. That's the one on 1062. Do you want the one on 1068 also?

Mr. Olson: I'll take a look at it. Well, you do not have them in your files, the compilation of the invoices that I just mentioned?

Mr. Holman: No, that's never been sent, never been submitted, and never been seen until it was marked [2233] for identification at that time, and not produced when McKelvey was in the office. Now, I have considerable more correspondence with McKelvey——

The Court: Am I correct in assuming now that this correspondence, at least it is not shown that they were received by Mr. Macri in due course of mail, but sometime during negotiations Mr. McKelvey brought them into your office?

Mr. Holman: Yes, brought them in, but they were neither shown nor discussed.

The Court: And weren't left with you?

Mr. Holman: No, no; never have had them.

Mr. Olson: Of course, we'll endeavor to show otherwise.

Mr. Holman: I hope you can.

The Court: I just wanted to get Mr. Holman's position on the matter. I'm interested now in the matter of production.

(Whereupon, statement by months of costs by Schaefer on 1062 was marked plaintiff's Exhibit No. 119 for identification.) [2234]

### M. C. SCHAEFER

the plaintiff, recalled as a witness in his own behalf, in rebuttal, testified as follows:

#### Direct Examination

By Mr. Olson:

Q. Mr. Schaefer, showing you defendant's Exhibit number 105, would you examine that and state whether or not you ever saw that before it was produced in court here yesterday? A. I did not.

Q. Was it ever received, the original of that, or a copy, ever received by you in the mail?

A. It was not.

(Testimony of M. C. Schaefer.)

Q. Now, I notice that it says on the top of it a corrected statement. Was any similar statement of which that may be a corrected statement ever mailed, furnished or handed you by Macri and Company or any of his representatives?

A. It was not.

The Court: May I see that, please?

Q. Now, showing you plaintiff's identification 119, Mr. Schaefer, can you state whether or not the original or a carbon copy of that statement was ever handed to Mr. Macri or to his attorney, do you know? A. I couldn't state as to that.

Q. Pardon?

A. I couldn't state that it was ever handed to them. I did not, I don't believe. I believe this here was mailed by myself to Mr. McKelvey, who was representing me at the time. This was gotten up at the request of Mr. Holman at a meeting in Mr. Holman's office on January 23. He wanted a breakdown as to what our costs were, what our expenses had been by the month.

Q. What discussion did you have then about costs? [2235]

A. Our discussion at that time was——

Q. Who was there, first, Mr. Schaefer?

A. At that time there was present Mr. Holman, Mr. Macri, Mr. McKelvey, Pat Darcy, William E. Schaefer, Roy F. Owen——

Mr. Holman: Who? A. Roy Owen.

Mr. Holman: That was the surety man?

A. That was the surety man, yes.



(Testimony of M. C. Schaefer.)

Q. Whose surety?

A. Well, he is an insurance adjuster, in his own business.

Mr. Holman: For the Glen Falls?

A. Roy F. Owen and Company.

Mr. Holman: For the Glen Falls? A. Yes.

Q. All right; now, what discussion was had then?

The Court: What date was this?

A. January 23.

Q. What year?

A. 1945. The discussion that time, that is, there had been previous discussions between McKelvey's office and Holman's office——

Mr. Holman: I move that be stricken as hearsay, your Honor.

The Court: Yes, that will be stricken. Tell what [2236] happened at that time, and what was said, Mr. Schaefer.

A. Well, at this meeting, and the purpose this was gotten up for was to arrive at a price, there was negotiation at that time to arrive at a new price for 1062, and also for 1068, and this was gotten up to show what our expenses had been, and before this time I had given Mr. McKelvey figures of what the average——

Mr. Holman: Your Honor, I object to the witness testifying as to his transactions with McKelvey. Naturally we can't combat those.

The Court: Yes, that is improper and will be stricken. Just confine yourself to what was said and done at this meeting.

(Testimony of M. C. Schaefer.)

A. Then at this meeting, further, there was discussion about the excavating, and we showed some of the pictures of the excavations, and at that meeting Mr. Macri or Mr. Holman stated for Mr. Macri that Mr. Macri was being paid for the quantity that he'd excavated, that he was not being paid for the quantity according to the specification, that is, on the 1 to 1 slope, and I asked Mr. Holman, and further Mr. Holman said he didn't know where Uncle Sam was paying anyone for other work, and he couldn't see how he was going to receive additional compensation out of that from Uncle Sam; well, I says "What will your attitude on that thing be if it is [2237] proven that Mr. Macri is being paid for excavation out one foot and on a 1 to 1, according to specification?" and Mr. Holman stated "Well, if that's the case, why, you may have a good legitimate claim against Sam Macri Company."

Q. Now, Mr. Schaefer, do I understand you're unable to say that a copy of this identification 119 was handed to Mr. Holman or Mr. Macri that day?

A. Not that day it was not.

Q. And you personally do not know whether or not it was ever handed to Mr. Macri or Mr. Holman?

A. No, I don't; that is, in my later conversation with Mr. McKelvey—

Q. Well, you can't go into that. With further purpose of identifying this 119, I'd like to call Mr. Macri, then, your Honor.

(Testimony of M. C. Schaefer.)

Mr. Holman: I would like to cross-examine this gentleman sometime.

The Court: All right, cross-examine before he leaves, then.

Mr. Olson: I might say I have considerable more rebuttal with Mr. Schaefer on other points.

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, was it not a fact that prior to the date—you say this meeting was on January 23, 1945? [2238]

A. That's right.

Q. Was it not a fact that prior thereto you authorized Mr. McKelvey to make the following proposition: That the Concrete Construction Company will carry out and finish contract number 1, that all costs are to be paid by Macri, and waive any performance or loss or damage hereto, and Macri similarly waive as to Concrete Construction Company; did you authorize that, or not?

A. I did not.

Mr. Olson: That question is objectionable in the first place, in asking for an attempted compromise.

Mr. Holman: Yes; well, this is all in compromise.

Mr. Olson: I wasn't going into that.

Q. You say you did not do that, sir?

A. I did not.

The Court: I'll overrule the objection.

Q. Now, isn't it a fact that at that meeting, and I'll have this marked for identification, may it please the Court, I'm taking it from my file—

(Testimony of M. C. Schaefer.)

(Whereupon, notation made by Mr. Holman at meeting was marked Defendant Macri's Exhibit No. 120 for identification.)

A. ———that in your presence, right at my desk, I made these entries as a proposition you were submitting, and made those drawings with respect to what you were stating [2239] about slopes, right under your nose, sir? Didn't you see that?

Mr. Olson: Now, that's objected to, as being notations made, whether they were made under Mr. Schaefer's nose or not, if Mr. Schaefer didn't make that proposition, then the fact Mr. Holman made a note that may have been to the contrary is certainly immaterial.

The Court: Well, I'll overrule the objection. I think the question is whether or not notations were made.

Mr. Holman: Yes, sir, in his presence.

Witness: I couldn't say to that; I don't recall.

Q. Do you recall that you and your brother, flanked by Mr. Darcy, sat on one wall, and that your surety representative sat over on the other wall, along with Mr. McKelvey? Do you recall that?

A. The surety I believe sat near the door entrance into your office.

Q. Yes. Now, it's a fact, is it not, Mr. Schaefer, that that was a very long conference, right?

A. I wouldn't say how long the conference lasted.



(Testimony of M. C. Schaefer.)

Q. It's a fact, was it not, that you had already been served with a notice that you were not to go on 1068, correct?

A. We were served with a notice?

Q. Yes, sir. [2240] A. That's right.

Q. Yes, sir; and it's a fact, is it not, that this meeting was solicited and promoted to a meeting by you, through your attorney, with us; requested, was it not; the meeting was requested?

A. That I requested the meeting through——

Q. Mr. McKelvey.

A. ——through Mr. McKelvey? I don't believe so.

Q. Did you have any word from me to come to a meeting?

A. I believe Mr. McKelvey asked me to come to Seattle and we would have a meeting with you at your office.

Q. Yes, sir; but you had no communication either from Mr. Macri or me to come to a meeting, did you? A. No.

Q. Now, isn't it a fact that at that time, on that date, was the first time that you had ever mentioned slopes, and that these drawings were made to mark out what you were talking about, made on the desk and pointed out by you as drawings of what you were talking about?

The Court: There's several questions in there, I think, Mr. Holman; whether that wasn't the first time you mentioned slopes——

(Testimony of M. C. Schaefer.)

Q. Whether that wasn't the first time you mentioned slope in any conference with me?

A. Yes, because that's the first conference I had with you. [2241]

Q. And wasn't it also a fact that these drawings were made by me as you indicated?

A. There were some sketches made by you.

Q. Yes; you recognize these, do you not?

A. I wouldn't be able to say.

Q. And wasn't it a fact that at that time you were proposing as a compromise and settlement, \$49.15 per cubic yard for the first contract, and \$28.00 per cubic yard——

Mr. Olson: I object to that, except insofar as it goes to show that they were negotiating for a price different than the sub-contract, otherwise it is incompetent.

Mr. Holman: Well, counsel called him for the purpose of showing Schaefer was in the office and there were negotiations for re-settling the contract.

The Court: It seems to me that's the only purpose this sort of testimony can serve in this suit. I don't think any party is bound by any offer they may have made by way of compromise settlement. I don't think you should be permitted to go into detail into offers and counter offers that extended over a long period of time. I think the only thing to show is that the parties didn't agree, and they tried to make some other arrangement. That's about all I can see that would be material.

(Testimony of M. C. Schaefer.)

Mr. Holman: That's my purpose. This gentleman [2242] has quoted me in the conference, and I'm very frank to say I can't remember what I said in that conference.

The Court: I wouldn't recognize as having any probative value any offer or counter offer, except to show the parties were in disagreement, and attempting to reach an adjustment.

Mr. Olson: That's my purpose in meeting in rebuttal at least the inference they were giving that there was no controversy as they went along.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Calling your attention to the notation on here, \$49.15 per cubic yard, and then a deduction of \$26.00, which was your bid, was it not——

A. \$26.00 was my bid.

Q. ——left a difference of \$23.15, broken down; you see that?

Mr. Olson: That's the very testimony I understood your Honor to say should be excluded.

Mr. Holman: Well, I wanted that in evidence as counter to counsel's last, your Honor. That's the only purpose it would have.

The Court: Let's see that.

Mr. Holman: Those are my memos, made at that conference, and that's all it could be, your Honor; whether it has any probative value or not, at least that's current. [2243]

(Testimony of M. C. Schaefer.)

The Court: Well, I'll reserve ruling on this. There's no document identified by Mr. Schaefer this last time on the stand that's been admitted. It hasn't been offered yet. Is that all, then, now?

Q. Well, except that broken down, was to be broken down, so that you would show how you comprised your \$49.15, wasn't it?

A. No, I don't recall them there figures at all.

Mr. Holman: All right, sir.

The Court: Did you want to call Mr. Macri now?

Mr. Olson: I did, in connection with this identification 119.

Mr. Hawkins: Can I ask Mr. Schaefer a question?

The Court: Surely.

#### Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, when you were in Mr. Holman's office with Mr. McKelvey, you were negotiating a settlement of the dispute that you had had with Mr. Macri, is that what I understand your testimony?

A. The reason for it was as to what—that is, Mr. Holman wanted to find out from me as to what work we were doing that we claimed wasn't a part of our work, and wanted to get a picture of the condition and the things that we were complaining of.

Q. You pointed out, I take it, at this conference, that Mr. Macri [2244] had not, according to your



(Testimony of M. C. Schaefer.)

lights, at any rate, excavated on a 1 to 1 slope; you pointed that out to them at that time?

A. That's right.

Q. And you complained that the contract required a 1 to 1 slope, is that right?

A. It was the——

Q. It was your position, in other words, at that meeting that this sub-contract between yourself and Mr. Macri required Mr. Macri to excavate to a 1 to 1 slope, and he was not doing that, is that right?

A. The specifications required that he do it that way.

Q. Yes, and that he was not doing as he agreed to under his sub-contract, is that right?

A. That's right.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.) [2245]

### SAM MACRI

one of the defendants, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Mr. Olson: Your Honor, this is the identification which I once withdrew as identification 32. I would like to have it re-identified now.

The Court: All right, we'll have it re-activated. Will it have another number?

The Clerk: Let it remain as 32.

The Court: The record will show that it is again presented.

(Testimony of Sam Macri.)

Mr. Olson: I would like to have the record so show, that I'm again presenting plaintiff's identification 32.

Direct Examination

By Mr. Olson:

Q. Now, Mr. Macri, handing you plaintiff's identification 32, and also plaintiff's identification 119, I'll ask you to read the first paragraph of plaintiff's identification 32, which is a copy of a letter addressed to Macri and Company, and to then examine plaintiff's identification 119, and tell me whether or not you did not receive 119, accompanied with the original of that letter, identification 32; the first paragraph is what refers to that exhibit.

A. Well, everything I receive I turn them over to Mr. Holman. [2246]

Q. Just a minute; I asked you to read the first paragraph of identification 32, then to examine identification 119, and tell me if you did not receive identification 119, or a carbon copy of it, or the original of it, as the first paragraph of that letter addressed to you says you did?

A. Absolutely not; I never received any of this copy, absolutely not, not one.

Q. Did you receive the original of this letter?

The Court: He's referring now to 119; he's waving it. The record should show it is 119. Now, did you get the last question?

A. Yes, your Honor; Mr. Matt Schaefer of Concrete Construction Company has furnished me with——

The Court: The question is, did you receive it?

(Testimony of Sam Macri.)

A. No, I don't recall receiving anything like that.

Q. Did you ever see this plaintiff's identification 119 before? A. No, sir.

Q. Never saw it? A. No, I never saw once.

Q. You saw it in Mr. Holman's office in Seattle?

A. Not this kind of stuff, no.

Q. You were right there, Mr. Macri, when we had it in Mr. Holman's office and it was marked for identification there?

A. You mean you had it? [2247]

Q. Yes, I had it, and Mr. Schaefer had it.

A. I didn't pay any attention to that.

Q. You didn't pay any attention to what was going on there? A. Not this stuff here.

The Court: Any further questions, Mr. Olson?

Mr. Olson: No.

Mr. Holman: In connection with counsel's offer, I would like to have marked for identification the original of the letter of December 5, 1944, and either our copy or the original produced by counsel of a letter to the Concrete Construction Company from Macri and Company on December 27, 1944.

The Court: Well, we'll have to proceed with some sort of order here. We'll let Mr. Olson make his offers, and then you can produce those others later on.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The Court will recess until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Wednesday, March 19, 1947,  
1:30 o'Clock P.M.

(All parties present as before, and the trial  
was resumed.)

The Court: Is your witness here, Mr. Holman?

Mr. Holman: He is, your Honor.

The Court: Had you come to a convenient break  
in your rebuttal here, Mr. Olson?

Mr. Olson: Yes.

The Court: I think, then, we had better finish  
Mr. Macri's case, and proceed with the rest of the  
rebuttal.

Mr. Holman: Call Mr. Klugg, please.

### JOHN KLUGG

called as a witness on behalf of the defendants  
Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Your name is what, please?

A. John Klugg.

Q. I understand you have a bad cold. Can you  
talk up pretty well, Mr. Klugg?

A. It is pretty hard for me to talk too loud.

Q. Talk as loud as you can, please. What is  
your full name?

A. John Joseph Klugg.

Q. And where do you reside, Mr. Klugg?

A. 815 South 5th Avenue.

Q. Yakima?

A. Yes.



(Testimony of John Klugg.)

Q. And you have been at that place of residence since before February 1, have you, 1947 [2249]

A. Yes.

Q. You've been there right along? A. Yes.

Q. Will you state your experience, please, in connection with performance of form panels for structures on reclamation jobs, the forms to contain the placing of concrete for reclamation work?

A. I started 'way back in 1922.

Q. 1922, sir?

A. 1922, when I first started.

Q. Where?

A. At Montana, Yellowstone Lake.

Q. And how long did you work?

A. I worked there a couple of years, and since 1930 I mostly worked steady on reclamation.

Q. Was that on reclamation work?

A. The biggest part.

Q. And then what has been your experience since?

A. Well, most of it out on part time contracting, and then done some house work, but most of it's been on this reclamation work.

Q. Yes, sir, and is it or is it not a fact that you right now are on a construction job, Mr. Klugg?

A. Yes.

Q. Is it or is it not a fact that I talked with you within [2250] the last week, and you explained that you couldn't come to testify willingly at all, or at least you couldn't come until the water was in your ditches, is that correct? A. That's correct.

(Testimony of John Klugg.)

Q. And the water is in your ditches now?

A. Yes, we got the last pour today.

Q. Now, Mr. Klugg, what is the type of work in the job you're performing now?

A. It's the pumping stations for the Roza Project.

Q. And are you familiar with the job 1062, schedule 1, the Macri job?

A. With when I was on there with Schaefer, yes, sir.

Q. Yes, sir; you were on that job, were you not, throughout the job?      A. Yes.

Q. What was your work, Mr. Klugg?

A. I was doing shop work, building forms.

Q. And you started for whom?

A. For Mr. Macri.

Q. And you continued how long for Mr. Macri?

A. Oh, it was only about a week or two, I think, when he subbed it to Concrete Construction, then I automatically went over with the other job.

Q. Now, in the week or so that you were working for Mr. Macri, had there been lumber delivered there on the job [2251] for building panels?

A. Yes, I guess so; there was some.

Q. And how did you spend your time in that week?

A. Well, we started first, we built the office, and then we started to build forms.

Q. And will you tell the Court with reference to the forms how you were building them, whether you were building them to use over and over again, or not?

(Testimony of John Klugg.)

A. Yes, they were built so we could make the panels.

Q. Explain that to the Court.

A. Certain type forms we could use over, and they fit in certain places—not for every structure.

Q. In connection with the Bureau of Reclamation project of this kind, what is the plan with respect to keeping the water up on the ground, or below the ground, as much as possible?

A. How's that?

Q. I say, in reclamation projects such as this 1062, what is the practice of keeping the water up on top of the ground as against keeping it below the ground; which do they do?

A. Well, they built a lot of pipe connections that goes on top, and other places they put in pipe that goes underneath the ground, and then comes out at a different elevation. [2252]

Q. Now, is it or is it not a fact the water is on top of the ground and when it goes down it is to go under something, and then comes up again to the desired level?

A. Well, it sometimes goes under a road, and other times through a draw, and comes up again on the other side, on a different level.

Q. Were there on this job, do you know, from your carpentry work, a number of what would be known as box structures, standard box structures?

A. Yes, there's some; the delivery boxes is mostly standard.

(Testimony of John Klugg.)

Q. And what would be the size of those, about?

A. Well, for the delivery boxes it's mostly four by four.

Q. Four feet by four feet?

A. Yes, and some three by three, and we had some five by five and six by six; it all depends on the size of the——

Q. Well, would that be the square dimensions?

A. Yes.

Q. And what would be the depth?

A. Three foot, two foot, six; up as high as I think six and a half or seven feet.

Q. And would that be the structures that went under?

A. The deep ones is mostly the pipes either come in, on a deep box, or going out of it.

Q. Mr. Klugg, do you remember being out on the job with a Mr. Mercelle of the Concrete crew, and with Mr. Macri, [2253] for the purpose of measuring some excavations?

A. Yes, we went out there one day.

Q. Did you measure, at that time? A. Yes.

Q. Did you do your best to get exact measurements? A. Yes, just as close as I knew how.

Q. And did you report your measurements to Mr. Macri at the time?

A. He was right with us.

Q. And do you have any record of the measurements? A. No, I didn't.

Q. Did you turn any record into the Concrete Construction Company? A. No, sir.



(Testimony of John Klugg.)

Q. Do you have any independent recollection at this time as to those measurements?

A. No, I could not.

Q. What was your function on the job after Mr. Schaefer took it over?

A. I still stayed on the job to build forms.

Q. And after Mr. Schaefer took it over did you have a free hand to build the forms your own way, or did you build them under direction of someone else?

A. No, most of them my own way.

Q. You built them your own way, sir? [2254]

A. Yes.

Q. And I'll ask you whether or not you recall going into the field the first day or two, with Mr. Waltie, I mean the first day or two after they came on the job, with Mr. Waltie and Mr. W. E. Schaefer, for the purpose of trying out the assembling of panels into the form?

A. Yes, I think I was out a couple of days.

Q. And in that connection did they ask you as to how it should be done?

A. Well, I don't remember on that whether they asked me or not.

Q. Do you remember the Mixomobile that was on this job?

A. The which?

Q. The Mixomobile; do you remember the big truck?

A. Yes.

Q. Can you tell me whether or not it was adaptable to this job, whether it was too heavy or too light, or what?

(Testimony of John Klugg.)

A. Well, I wouldn't know about that. I know it's pretty heavy, but it could be used, I know, because it was used there.

Q. Mr. Klugg, from your experience, will you tell me whether or not it is possible to figure the board feet of lumber for the building of forms without knowing the square feet of surface?

A. That would be pretty hard to do. [2255]

Q. Well, would it be practicable, sir?

A. No, not this forms, unless you have plans.

Q. Mr. Klugg, you were subpoenaed by the deputy United States Marshal? A. Yes.

Q. For the defendants Macri? A. Yes.

Q. Now, were you also subpoenaed by the plaintiff Schaefer? A. No.

Q. Sir? A. No.

Mr. Holman: You may inquire.

### Cross-Examination

By Mr. Olson:

Q. I handed you a subpoena last night, did I not, Mr. Klugg?

A. Might be, I don't remember; you might have laid it down there someplace.

Q. Pardon?

A. I don't remember seeing the paper around there, anyhow.

Q. Didn't I just hand you a subpoena last night to be here in court today at 1:30?

A. Might be, at that, but I don't know what I did with that; I didn't see it after.

(Testimony of John Klugg.)

Q. But I did hand you a subpoena?

A. Might did, at that, but I don't know much exactly about that. I was not interested in that.

Q. Well, I not only might have; I did, didn't I?

A. I guess you did, yes.

Mr. Holman: Did you communicate with counsel and tell him I had advised you I would subpoena you now that your work was through?

Mr. Olson: That's objected to as immaterial.

Mr. Holman: Well, I'll withdraw that.

Q. (By Mr. Olson): Mr. Klugg, you say you remember going out on the project with Mr. Macri and Mr. Mercelle, and checking structures?

A. Yes, sir.

Q. And it's a fact, is it not, that you checked only about 10 structures?

A. It is some around near that; I wouldn't say exactly what it is, but it's around in the neighborhood of that.

Q. Would you say it would be not more than 10 structures?

A. Well, I wouldn't say it would be, because we weren't out very long.

Q. Your best judgment is it is not more than 10 structures? A. I don't think it is.

Q. Now, did you see Mr. Macri making any notes while you were there?

A. Well, I don't remember about that. It's quite a while ago. It is three years ago, almost. It's too hard to remember all that. [2257]

(Testimony of John Klugg.)

Q. Now, it's also a fact, is it not, that each of those not to exceed 10 structures that you examined you found were tight and not proper for form setting?

A. Well, not according to the way they were supposed to be, they wasn't. There were some, I think there was some of them right, pretty close to it; of course, I don't know how close, what their agreement was. I wouldn't know what they're supposed to be.

Q. And it's also a fact, is it not, that Mr. Macri after seeing that these structures that you were measuring with him were wrong, he had you discontinue?

Mr. Holman: Just a minute; I object to that question. Counsel is assuming something the witness has not answered.

The Court: Read the question here.

(Whereupon, the reporter read the last previous question.)

The Court: I'll sustain the objection. I think in view of the fact that this witness is subpoenaed by both parties, I don't think that there should be that type of question asked.

Mr. Olson: Well, your Honor, I'm in the same position counsel was when I put on Mr. Black; counsel wasn't restrained in his cross-examination.

The Court: Well, I think this particular question, you're [2258] asking the witness to draw a conclusion there that's hardly justified from what



(Testimony of John Klugg.)

the evidence is so far. You may inquire into what they did, and what Mr. Macri told him.

Q. (By Mr. Olson): Who suggested, if anybody, that you discontinue checking these structures?

A. Well, for one thing, it got late; we wanted to get in. I couldn't tell exactly what happened.

Q. Do you remember whether or not it was Mr. Macri that said "Let's go in"?

A. Well, when it comes right down to saying the truth, I couldn't; it's too long ago, but I think there is something in that, that we got about so many checked and we went in.

Q. Well, now, you say you went out on the field with Mr. Waltie to check the forms against the excavation, on the start of the job?

A. No, I don't think, not that I remember; I went out and helped to set a few of them, to start with, but I don't remember whether we went out to measure that or not.

Q. What you were referring to then was that you took some of the forms out and you helped set some of the first forms?      A. Yes.

Q. And how did you find the first excavations?

A. Well, the ones that I had to set, we had to do too much excavation, and I told this foreman, I think Mr. Schaefer was there, too, I said "I don't like to do the excavating; I want to stay in the shop, because there is too much work."

Q. What took the most time, the excavating, or setting the forms?

(Testimony of John Klugg.)

A. Well, some of them took just about half and half.

Mr. Olson: Did you ask the witness about the lumber? I didn't think counsel did.

The Court: It wasn't gone into.

Mr. Holman: I would like to go into that with this witness, your Honor, if I may.

The Court: All right.

### Redirect Examination

By Mr. Holman:

Q. Handing you Exhibit 104-72, with respect to the lumber shown there, can you tell me with reference to this exhibit 104-72 whether or not that lumber that is listed there is lumber that can and would normally be used in building panels for forms? A. Yes, ship-lap and——

The Court: What reference is that?

Q. 104-72, your Honor. Handing you what has been marked plaintiff's Exhibit 104-58, will you inspect the types of lumber on that and tell me whether or not that is such [2260] lumber as can be used in building panels for forms?

A. Well, we used some of this ship-lap, we used, but two by eight, we may use some.

Q. How would you use two by eight?

A. We ripped some of it up for fillets.

Q. Explain how you would rip it up for fillets.

A. We'd make the three by three fillets in the corner, we had to rip this up in order to cut across the corner.

(Testimony of John Klugg.)

Q. Then would two by eight, number 3, common, 4,000 feet, be an excessive amount of that type of lumber for building forms, for the purpose?

A. Well, I don't think so.

Q. And the other items of lumber on 104-58 you recognize as usual?

A. That's the same bill that I looked at?

Q. Yes; the two by sixes also would be used?

A. Yes, we ripped up a lot of different wood that we got.

Q. You ripped up different sizes of lumber?

A. Yes.

Q. Then would you refer to 104, sub-number 65, and tell me whether or not that lumber is all of a type that would be used normally in building panels for forms?

A. Yes, we used that type all the way through.

Q. Thank you; then with reference to—I'm missing some, Mr. Klugg; would you look at 104-73—I didn't notice there [2261] were separate pages numbered here—would you say that was lumber that would be used?

A. Yes, one by eight and two by four.

Q. And then next with reference to 104-66, will you look at that, please, and tell me whether or not that is the type of material?

A. Yes, that's the same I looked at.

Q. Take the second page.

A. That's the same; we used this all the way through.

(Testimony of John Klugg.)

Q. Then look at the third page, 104-67.

A. That's the same type of lumber, and we used that right along, four by four, to put the corners on the boxes.

Q. Now, do you recognize the signature on 104-70, A. E. Mercelle?      A. No, I wouldn't.

Q. Do you know who A. E. Mercelle was?

A. Yes.

Q. Who was he?

A. Well, he worked for Concrete Construction, but the signature I wouldn't know.

Q. And your answer would be the same for 104-71?      A. Yes.

Q. Will you tell me whether or not A. E. Mercelle was there with you in January, 1945?

A. Well, he was there on the job. [2262]

Q. 104-60, will you tell me whether or not that is lumber of the type that would be used in building panels for forms?      A. Yes, I think so.

Q. And 104-61, can you tell me whether or not that would be?

A. Yes, that would be used, just the same.

Q. Do you know who Jim Ellisgren was?

A. No, I don't know the name.

Q. Or Ackley, do you know who he was?

A. No, I don't.

Q. I was referring, your Honor, to 104-62 and 104-64, for signatures. Now, then, directing your attention to 104-9, it has no dimensions on it, but turning to 104-10, will you tell me whether or not you recognize those as quantities that would be—



(Testimony of John Klugg.)

I mean as types of lumber that would be used in building panels for forms?

A. Well, we used two by three by sixteen, we used some of that.

Q. Used some of that, sir?

A. Yes, in different ways.

Q. Well, the quantity is only 360 feet?

A. I know we had some on the job.

Q. And 96 feet; would you say those quantities were reasonable to be used on the job?

A. Well, we hadn't much use for that kind of stuff, but we [2263] ripped them up.

Q. That's 104-10, and would your answer be the same with respect to 104-12, for the two by threes?

A. Yes, we ordered two by three to use.

Q. You ordered two by three? A. Yes.

Q. And your answer would be the same with respect to the two by three for 104-13?

A. Yes.

Q. Then 104-1 has no dimensions on it, has it?

A. No.

Q. All right, will you take 104-2? Do you recognize those items as ones that would be used in your work on the job, three by twelve, fourteen feet long? A. I think it's two by twelve.

Q. No, three by twelve, fourteen feet long.

A. Well, sir, I don't remember that.

Q. Could that be used?

A. I think they used that for runways on the job.

(Testimony of John Klugg.)

Q. Runways on the job, yes, sir; and it is a continuation of the same bill, 104-3—oh, that's a duplicate, is it not, sir?      A. Yes.

Q. 104-3 is a duplicate of 104-2, a carbon. 104-4 is a statement only, is it? [2264]

A. Yes, just a statement.

Q. Now, do you recognize the materials shown on 104-5 as materials that were used in preparing forms, panels for forms?

A. Yes, this lumber would be used there.

Q. It could be?      A. Yes.

Q. And how about 104-6?      A. Yes.

Q. I notice in that there are some rolls of paper; what were they used for, do you know?

A. I really don't remember any more what we used the papers for.

Q. Calling your attention to that date, 3/16/44, can you tell me whether or not that was at or about the time you were working for Mr. Schaefer?

A. Well, I don't remember. I never had much to do with that sort of thing.

Q. All right, sir. And on 104-7, two by four by twelve feet long, would that be normally used?

A. Yes.

Q. And on 104-8?

A. Shingle nails and lath nails.

Q. Oh, those were nails?      A. Yes. [2265]

Q. Would those be used?

A. Yes, we used some of them there.

Q. Then 104-15 is a statement only?

A. Yes.

(Testimony of John Klugg.)

Q. And 104-16? A. Yes.

Q. And turn to 104-17, and tell me whether or not you used six bundles of lath, if you recall. Do you remember that? A. I don't remember it.

Q. And who was Mr. Sheffield?

A. Well, sir, I wouldn't know.

Q. You don't remember that name?

A. No. I might know the man.

Q. And 104-18, will you look through that list, please, and tell me whether or not that was material that was used for building forms, panels for forms?

A. Yes, it is all to be used.

Q. And 104-19, building paper, do you recall anything about that? A. No, I don't.

Q. All right, sir; and 104-20, will you look through those dimensions and tell me if there's the same answer as to that?

A. Yes, that's the same. [2266]

Q. That was used?

A. The dimensions were used there.

Q. It's capable of being used? A. Yes.

Q. Then 104-21, what about those dimensions, four by eight and three by ten, eighteen feet long; were those capable of being used?

A. Well, I think they were delivered there, but not that we wanted them.

Q. Well, were they used?

A. I don't know; I think we did rip some of that up.

The Court: Does he mean they rip-sawed it with a hand rip saw?

(Testimony of John Klugg.)

A. No, we had a power rip saw. If we need some lumber we just ripped it up.

Q. Now, then, with reference to 104-22, will you look at those dimensions and tell me whether or not they were capable of being used for panels to go into forms? A. Yes.

Q. 104-23 is a statement only, is it not, Mr. Klugg? A. Yes.

Q. You're used to seeing statements of lumber, are you not? A. Yes.

Q. Now, 104-24, will you look at those dimensions and tell me whether or not they were such as would be used? [2267] A. Yes.

Q. And 104-25? A. That's a duplicate.

Q. Oh, it is a carbon of the other. 104-26, would that be usable? A. Yes.

Q. And 104-27? A. That's a duplicate.

Q. That's a carbon again, is it, sir?

A. Yes.

Q. Do you know some of the yards from which the lumber did come? A. No, I don't.

Q. 104-30 is a statement merely, is it not?

A. Yes.

Q. And 104-31 is a statement merely, is it not?

A. Yes.

Q. 104-32, will you look at those dimensions and tell me whether or not it would be used for building panels for forms?

A. Well, that's stuff we would have to rip up.

Q. You did have to have stuff that you had to rip up?



(Testimony of John Klugg.)

A. Yes, we ordered wide enough, in order to save lumber.

Q. You would rip up other stuff? A. Yes.

Q. 104-33? A. That's a duplicate.

Q. 104-34, will you look at those dimensions, two by four, fourteen feet long?

A. Yes, that's lumber that we used.

Q. And 104-35 is a carbon of that, sir?

A. Yes.

Q. And 104-36, two by four, twelve feet long?

A. Yes.

Q. Would that be the same, sir?

A. Yes, that would be the same.

Q. And 104-37? A. That's another——

Q. Another copy? A. Yes.

Q. 104-38, two by four, sixteen feet long, would your answer be the same for that, sir?

A. Yes; two by six, it is.

Q. Two by six, sixteen feet long? A. Yes.

Q. And 104-39 is a copy of that? A. Yes.

Q. 104-40, two by four? A. Yes, sir.

Q. When you say yes, you mean they would be used for [2269] building panels for forms?

A. Yes.

Q. And 104-41, two by ten?

A. Yes, we used that.

Q. All right, sir. Now, 104-42, 2016 feet of plywood, can you tell me whether or not from your memory there was a substantial quantity of plywood there? A. Yes, we used it quite a bit.

(Testimony of John Klugg.)

Q. What did you use that for?

A. For to line these boxes.

Q. And 104-43 is a carbon of the same?

A. Yes.

Q. And 104-45 is an additional carbon; and 104-46 is an additional carbon?

A. It looks the same.

Q. 104-43 through 46 look like carbons?

A. Yes.

Q. Will you look at 104-47, Mr. Klugg, and tell me whether or not those dimensions were such as would be used as you have indicated?      A. Yes.

Q. All right, sir, 104-48, those dimensions, four by eight?

A. That's something we don't use there.

Q. You did not use four by eight?

A. I think we had some on the job, but we didn't use them [2270] only in case we had to.

Q. They were emergent lumber?

A. I don't know how they got there. I think that got there by mistake.

Q. And did you use them, do you recall?

A. We used some of them.

Q. Well, you can't give me the quantity off that bill, anyhow?

A. No, that's pretty hard to do.

Q. And 104-51, you do not know Sheffield?

A. No.

Q. Or Jensen, on 104-52—Jensen is 104-53.

A. No, I wouldn't.

(Testimony of John Klugg.)

Q. Now, will you look at 104-54 as to dimensions and tell me whether or not your answer would be the same as to those?

A. Yes, it would be the same.

Q. Do you know who "H.P.N." is?

A. No, I don't.

Q. All right, sir. Would you look at the dimensions on 104-56 and tell me whether or not your answer would be the same, would those dimensions be used?

A. Yes.

Q. What is your answer on that, sir?

A. Most of that would be used there, I guess, far as I can tell. One by six and one by eight, we had to use that right along. [2271]

Q. Yes, sir; 104-78-79-80, you recognize as trucking bills?

A. Yes.

Q. And 104-81 you recognize as a trucking bill?

A. Yes.

Q. And 82 and 83. 104-84, who was M. E. Stickney, do you know?

A. Stickney was the superintendent for Mr. Macri.

Q. On that job?

A. Yes.

Q. All right, sir. Will you tell me whether or not from time to time as you required lumber for building forms it was purchased or delivered to you from local markets, to you?

A. No—some; most of them come from Seattle, much as I recall.

Q. All right, sir. Will you tell me whether or not, if you recall, lumber was readily available, or difficult to get, at that time?

(Testimony of John Klugg.)

Mr. Olson: Objected to as being immaterial, if the Court please; no proper foundation laid for asking this witness whether lumber was hard to get.

Mr. Holman: My point being, your Honor, on your Honor's ultimate determination of attempted good faith in compliance.

The Court: Well, sustain the objection. I don't think [2272] the foundation has been laid to make this witness an expert on lumber.

Q. (By Mr. Holman): My Klugg, were you customarily handling lumber and currently informed as to the availability of lumber at the time you were working on 1062?

Mr. Olson: Objected to as being leading to the extent he's practically testifying.

The Court: Well, I'll overrule the objection. It is leading.

Q. I'm asking whether or not you knew the general availability of the market for lumber at that time.

A. Well, I know it wasn't so very easy to get, but then most of the time we got it in time; sometimes a little bit late getting there.

Q. Now, will you tell me now, to be responsive to my other question, Mr. Klugg, what was the fact with respect to delivery of lumber to you?

A. I didn't quite get that.

(Whereupon, the reporter read the last previous question.)



(Testimony of John Klugg.)

Q. I want to know about delivery of lumber. Will you tell me that again?

A. Do you mean that it was delivered in time, or——

Q. Yes, what was the fact as to deliveries?

A. Well, that's pretty hard to tell about this lumber, how [2273] it come in there, because we got lumber coming there right along.

Q. There was lumber coming right along; can you tell me whether or not at times lumber was purchased on lists furnished from you, furnished right off, for immediate delivery?

A. No, I did not.

Q. You did not?           A. No.

Q. Were you ever required by Mr. Darcy or any of the Concrete Construction Company to make out a list for future delivery?

A. I don't recall that; I didn't make very many lists. Once I did make some, but Mr. Darcy took most of that.

Q. Mr. Darcy was supposed to 'tend to that?

A. Well, he mostly turned in the amount of lumber we wanted.

Q. And would he turn it in to you?           A. No.

Q. I'm directing your attention to Macri's Exhibit 85, shown dated July 25, 1944, and will ask you, calling your attention to the chute and the stilling pool designation there, whether or not you recall working with Mr. Darcy on making that, or making up that list yourself?

A. I don't recall it.

(Testimony of John Klugg.)

Q. You do not, sir? Now, can you tell from that list as to [2274] the types of lumber being appropriate for the stilling pool? A. Yes, it is.

Mr. Olson: Well, now, your Honor, it isn't proper, it seems to me, to ask this witness if he can tell from looking at an exhibit whether it would be the type of lumber appropriate to a stilling pool.

The Court: Sustain the objection.

Mr. Holman: Your Honor, the answer should be stricken, too, then.

The Court: I didn't know he had answered.

Mr. Olson: I move the answer be stricken.

The Court: Well, the answer will be stricken.

Q. (By Mr. Holman): And what does S-4 mean? A. Dressed on four sides.

Q. That would be planed on four sides, would it not? A. Yes.

Q. And can you tell me from this identification whether or not there is any flooring on that list, as to dimensions?

A. Well, it isn't specified.

Q. You can't tell off the list?

A. No, you have to specify it.

Q. And in the form building, building panels for forms, were smooth four sides required, or smooth one side only?

A. Well, they mostly wanted size; it didn't make any difference [2275] whether it is all four sides, but it should be sized, for thickness and width; two by four, especially.

Q. That would be smooth on how many sides?

A. Well, it would really only require two edges.

(Testimony of John Klugg.)

Q. Two edges, those should be smooth?

A. Yes.

Q. Well, how would a smooth on four sides be used?

A. Well, that would be the same. It could be dressed on four sides.

Q. Yes, I understand, but in building either a stilling pool or a structure how would smooth on four sides be necessary?

A. Well, it isn't necessary.

Q. Can you tell me whether or not there was any flooring delivered while you were there?

A. Yes, regular flooring, yes; there was some there.

Q. Do you remember the quantities?

A. No, I would not.

Q. And do you remember whether or not there was lumber delivered with four sides smooth?

A. On two by four, yes, and other.

Q. Can you recall whether or not the lumber that was delivered was new lumber, or second hand lumber, or used lumber, or what?

A. We had one bunch right from the start that was used lumber. [2276]

Q. There was one bunch right at the start that was used lumber? A. Yes.

Q. Could you give the Court an estimate of the quantity of that?

A. Well, that's pretty hard to tell.

Q. Did it run into several thousands, or a small amount?

(Testimony of John Klugg.)

A. It might have been a thousand or a couple of thousand; I don't know.

Q. Would you say to the best of your recollection it would not exceed two thousand?

Mr. Olson: That question is objected to as being leading.

The Court: Sustained; he can state.

Q. (By Mr. Holman): Give me the best of your recollection of the quantity, if you can.

A. Well, it might be two thousand feet, but it's hard to tell after that long.

Q. Now, was that delivered when you were working for Mr. Macri, or Mr. Schaefer?

A. Well, sir, I don't even know that.

Q. You can't recall whether it was delivered to Mr. Macri or to Mr. Schaefer? A. No.

Mr. Holman: That's all. [2277]

#### Recross-Examination

By Mr. Olson:

Q. All two by fours are smooth on four sides, are they not, Mr. Klugg?

A. Not altogether, not all the time.

Q. Well, the general standard two by fours are smooth on all sides?

A. Yes, it's dressed on four sides.

Q. That's the standard type of two by four, isn't it? A. Yes.

Q. Now, what type of lumber or types of lumber as to size and dimensions would you use in making the structure forms on job 1062?

A. Well, we used ship-lap.



(Testimony of John Klugg.)

Q. Ship-lap?           A. Yes.

Q. All right. Now that ship-lap would be one by what?

A. One by eight; some narrower, some six, but mostly one by eight.

Q. And some six?

A. We had some one by six, some.

Q. What else would you use?

A. Two by fours.

Q. All right.           A. Two by sixes.

Q. What did you use the two by sixes for?

A. We ripped them down to five inches.

Q. I mean without having to go to work on them and make them into something else, what type or size or dimension of lumber would you use in making the forms on 1062, without having to make it into some other size?

Mr. Holman: I object to that question as counsel has limited it, because the witness already stated they used other dimensions besides; now he's asking the question, just using this type only.

The Court: He's asking what types they used without ripping them down. I think that's clear enough. Overruled.

Q. (By Mr. Olson): Do you understand me? Without having to do the ripping, what size lumber would you use? Now, you told me ship-lap and two by four.

A. And four by four we used on that job.

Q. And four by four?

A. Yes, and we used two by six.

(Testimony of John Klugg.)

Q. Well, now, your two by six you had to rip them, to use those?

A. Well, it took two by six to make what we wanted. You couldn't buy what you want. To make five inch we had to have two by six, in order to get five inch, otherwise it is two by five; it had to be full width.

Q. What did you use a two by five for? [2279]

A. Used them as a bulkhead between the two forms. The concrete was five inch thick, and we had to use a two by five just to come in between the two walls; what they call a bulkhead.

Q. All right. Now what other did you use?

A. Well, that's about the biggest part, and we have used different widths to make our moldings out of it, to get our moldings out for the fillet; that's where we had the wider pieces.

Q. Well, now, would you use a three by ten, Mr. Klugg?

A. No, we had no use for it.

Q. Pardon?

A. Not for the form work; we had no use for it, ordinarily.

Q. And how about a four by eight; did you have any use for that?

A. No.

Q. As far as bulding forms are concerned?

A. No.

Q. And your two by eight?

A. Well, that's what we used to rip up to make moldings out of. We ordered them that way, so we would save lumber. We had to have certain widths to make either one or two pieces out of.

(Testimony of John Klugg.)

Q. Two by eight is what you ripped up to make fillets out of? [2280]

A. Makes us two pieces of molding.

Q. Isn't it a fact, Mr. Klugg, that you were continually delayed in your job on account of the slow and non-delivery of lumber for building forms?

A. We was delayed some.

Q. You were delayed continually, were you not?

Mr. Holman: Just a minute. Your Honor, I submit the witness answered the question.

The Court: He did answer that they were delayed some. I'll overrule the objection to the second question.

(Whereupon, written statement of John Klugg was marked plaintiff's Exhibit No. 121 for identification.)

Q. (By Mr. Olson): It is a fact, is it not, Mr. Klugg, that you were continually delayed throughout the time in building forms by reason of not having the lumber available?

A. Well, we was delayed some. We always had to use different lumber, if we was delayed, we just used different lumber to make up what we needed.

Q. What would you do when you ran out of lumber?

A. Well, a few times we took lumber off of other forms that was laying idle; we take it off and use it.

Q. And you had to do that continually throughout the job?

A. Oh, not so continually, but we used it some.

(Testimony of John Klugg.)

Q. What was the condition of the lumber that you were [2281] getting? You said you had one load of used lumber. In what manner was it used—or rather, just describe that used lumber that you referred to.

A. Well, some of it had concrete on it, and some had nails in it.

Q. Some had concrete on it and some had nails in it? A. Yes.

Q. And how about some of the lumber being full of knot holes and dry rot?

A. Well, that's the grade of lumber you get. Some of it was bad, I know.

Q. Showing you plaintiff's identification 121, Mr. Klugg, is that your signature on that?

A. Yes, sir.

Q. Your son-in-law typed that out, did he not, under your direction? A. Yes.

Q. And then you signed it? A. Yes.

Q. This was dated October 24, 1946?

A. Somewhere that time, I guess.

Q. I'll ask you if you did not state at that time in this statement: "We were continually delayed on account of slow and non-delivery of lumber for building forms"?

A. Yes, that's what I put down, but we was delayed some, I [2282] know.

Q. Now, did one load of lumber come that was tongue and groove?

A. We had some tongue and grooved, yes.



(Testimony of John Klugg.)

Q. Was that adaptable to making structure forms?

A. Yes, it is, but it didn't match with our other lumber.

Q. It didn't match with the other lumber that was furnished?           A. No.

Q. Did that cause you any trouble or inconvenience or delay?

A. Well, it's just we couldn't use it with the others; we had to make separate panels to use that by itself.

Q. Then I notice the statement in here "Several times we had to strip ship-lap from some of the larger panels to make other panels used right away, then re-sheath those frames when lumber came."

A. I said that.

Q. What did you mean by that? What operation did you go through?

Mr. Hawkins: I object to that question.

The Court: For what reason?

Mr. Hawkins: Counsel is apparently attempting to impeach this witness by this prior inconsistent statement. It seems to me that the proper way to do it is to ask the witness if he did or did not say that at that time. [2283]

The Court: Yes, I think that's a good objection.

Mr. Hawkins: Now, he's asking him to explain something in this identification, that's not in evidence yet.

Q. (By Mr. Olson): Well, I'll ask you if you made the statement "Several times we had to strip

(Testimony of John Klugg.)

ship-lap from some of the larger panels to make other panels used right away, and then re-sheath those panels when lumber came''?

A. I said it.

Q. Now, will you explain what you meant by that?

A. Well, we had to have panels. If the lumber wasn't right exactly there, we took it off the panels that wasn't being used, and repaired the others, what we had to use.

Q. And then when lumber came would you have to put it back on to the other forms from which you had removed it?

A. Yes.

Q. That's what you meant by re-sheath those panels?

A. Yes.

Q. You took the new lumber and put it back on the old panels from which you had taken lumber off before?

A. Yes.

Mr. Olson: We offer plaintiff's identification 121, your Honor.

Mr. Holman: I object to it, your Honor. The witness' testimony has been consistent throughout. We [2284] have not even had a chance to read it yet.

The Court: Let me see it.

Mr. Holman: It's not inconsistent with his testimony, your Honor, as counsel read from it.

The Court: I don't believe it is admissible. He has admitted saying everything that Mr. Olson called his attention to, as I recall it; he admitted saying that in his statement. There is nothing in

(Testimony of John Klugg.)

there contradictory to what his testimony now is.  
Sustain the objection.

Mr. Olson: That's all.

### Redirect Examination

By Mr. Holman:

Q. Mr. Klugg, when you signed this statement, identification 121, who was there; who was talking to you, do you recall?

A. Yes; there was myself; son-in-law; Mr. Schaefer; Mr. Darcy.

Q. That's M. C. Schaefer and Pat Darcy?

A. Yes. I think there was somebody else there.

Q. Somebody else?           A. Yes, sir.

Q. Now, can you tell me whether or not the word "continually" used in that statement was of your adaption, or suggested by them?

Mr. Olson: If your Honor please, if the statement is not going into evidence——

The Court: Well, I'll overrule the objection.

Q. (By Mr. Holman): Did you elicit or volunteer the word "continually"?

Mr. Olson: That question is objected to as being leading and suggestive.

Q. (By Mr. Holman): Well, did you or did you not?

Mr. Olson: Same objection. That's the same question as counsel objected to to me; if he wants to ask him the circumstances——

The Court: I think the proper method is to ask him what he did say, and see how it corresponds to what is in the statement.

(Testimony of John Klugg.)

Q. (By Mr. Holman): Can you tell me what you did say with respect to the word "continually"?

A. Well, on this statement, as much as I know, that is, I make that as close as I could think. I told them what happened there; of course, they know it anyway. We talked that over before. Of course, we did keep there, besides, so I didn't have much time to make it.

Q. You didn't have much time to make a statement?

A. Yes, we had a meeting there without other partners, and we delayed them pretty late.

Q. So the statement was made in a rush of time?

Mr. Olson: That's objected to.

The Court: That's leading. Sustained.

Q. (By Mr. Holman): Did you yourself keep any list of time that [2286] you lost in performance of your duties by reason of any delay of lumber?

A. No.

Q. Was any request ever made upon you by Mr. Darcy or any other superintendent to list your time?

A. Not direct, no.

Q. Did you ever give any notice to either Mr. Staples, Mr. Ashley, Mr. Stickney, or Mr. King as to the amount of time that you had lost?

A. No.

Q. Will you tell me whether or not any complaints were ever made to you by Mr. Darcy or by Mr. Waltie that the forms you were making were incorrect?

Mr. Olson: That's objected to as not being proper redirect examination.



(Testimony of John Klugg.)

The Court: Sustained; not proper redirect.

Q. (By Mr. Holman): This would be a direct question, your Honor, if I may ask it. I'll ask you whether or not in due course of preparing forms, panels for forms, it is usual to bring them back to re-shape them before they go out on the job again?

A. Yes, we had most all come back to the shop and re-assemble and go out.

Q. Is that usual practice? A. Yes. [2287]

Mr. Holman: That's all.

The Court: Do you have a question for Mr. Klugg?

Mr. Hawkins: Yes.

#### Cross-Examination

By Mr. Hawkins:

Q. Mr. Klugg, Mr. Olson asked you if a two by four planed on all four sides wasn't the standard two by four. Now, I want to ask you if a rough cut two by four is not also a standard piece of lumber?

A. Yes, it is, but it is customary to be dressed on all four sides.

Q. And practically all lumber yards carry both items? A. Yes.

#### Recross-Examination

By Mr. Olson:

Q. Mr. Klugg, when did you talk with Mr. Macri last, before testifying today?

A. When did I talk to him?

Q. Yes.

(Testimony of John Klugg.)

A. Well, I haven't talked to him only about a week ago, about the only time, and today, he stood down on the sidewalk, he come up to me, we talked, but we didn't talk about this case or anything.

### Redirect Examination

By Mr. Holman:

Q. Well, when you talked with Mr. Macri about the case as counsel referred to, a week or so ago, do you remember that occasion? [2288]

A. Oh, we talked about——

Q. I just asked if you remembered the occasion?

A. Yes.

Q. Where did he talk to you?

A. Up at the hotel.

Q. How did you get up there?

A. My bond man, Mr. Lewis, wanted me to come up.

Q. Your bond man, Mr. Lewis? A. Yes.

Q. Did he tell you what they wanted you for?

A. No, they didn't tell me much of anything.

Q. Now, at that time did Mr. Macri say anything to you about paying you any indebtedness he owed you? A. Yes, he mentioned it.

Q. What did he say about it?

A. He said he just forgot about it, or didn't get the bill, or something. I didn't mention much about it.

Q. How long before that has it been since Mr. Macri mentioned paying you that indebtedness?

A. Well, I haven't seen him since I left the job down there.

(Testimony of John Klugg.)

Q. What was the indebtedness for, Mr. Klugg?

A. For a pump that was supposed to be stolen there; what happened, I don't know.

Q. A pump stolen off the job? A. Yes.

Q. It was your pump? A. Yes.

Q. And is it not a fact that in the conference with Mr. Maceri that was discussed regardless of any of your testimony?

The Court: That's leading. You've been quite strict in your objection to leading questions, Mr. Holman. I think you should refrain from the same practice yourself, in all fairness.

Mr. Holman: I think that's all. May Mr. Klugg be excused, or do you want to use him?

Mr. Olson: No, he may be excused.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: Your Honor, I am prepared to——

The Court: Well, let's see—is that all of your testimony, Mr. Holman?

Mr. Holman: That is, except the redirect on the examination of Miss Callahan. That was suspended to let counsel go on with his rebuttal testimony while Mr. Klugg was being secured.

The Court: You're not ready to go on with the cross-examination of Miss Callahan?

Mr. Olson: Yes. I thought that counsel was through, though, with Miss Callahan. [2290]

Mr. Holman: On direct.

The Court: He is through with direct, but what he means is that he will have redirect after you finish your cross.

## ELIZABETH CALLAHAN

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

## Cross-Examination

(Continued)

By Mr. Olson:

Q. Do you have your copy of Exhibit 91 there, Miss Callahan? A. That's on 1068, is it?

Q. Yes. A. Here it is.

Q. All right; now, referring to item 1 there, labor, that was made up from Macri's identification 21, or the same figures as shown on identification 21, which is a certified copy of a payroll, I think, on 1068?

A. Yes, except it is not the full payroll.

Q. You mean that this is not the—21 is not the full payroll?

A. Oh, yes, 21 is the full payroll.

Q. My question is that your item 1 is made up from this, although it does not include all of it; it is made up from 21? A. Yes.

Q. Now, what items of 21 did you include in your item of [2291] labor, item 1?

A. What items?

Q. Yes; how did you arrive at your item number 1 off of Macri's 21; how did you arrive at that?

A. Well, I get a payroll from the superintendent, that's not complete, you understand; I mean, it has the names and hours, and then I recopy that, keeping one and sending one to the Bureau, and the superintendent has marked the concrete men.



(Testimony of Elizabeth Callahan.)

Q. Well, then, you didn't make it up off of that payroll? A. Yes, it is the same thing.

Q. Well, then, show me, if it is the same thing, what I want to find out. Take any week you want to, and show me where you got the figures to make your \$49,000.00. What I'm getting at is this, Miss Callahan——

A. I'm not sure I understand.

Q. ——your payroll includes the entire payroll for doing all types of work on 1068, doesn't it?

A. Yes.

Q. Now, what I want to know is how could you tell by looking at this payroll what part of it to put in your item 1?

A. You couldn't; you'd have to look at the superintendent's payroll.

Q. In other words, you can't tell by looking at the certified copy of the payroll? [2292]

A. I can tell—the certified copy, no.

Q. You cannot tell by looking at the certified copy of the payroll alone what items to put on your item 1? A. No.

Q. So that in making up item 1, then, you have put down the total of such figures as have been indicated to you by someone else, from some other record other than Macri's 21?

A. It is off the original payroll; is that what you mean?

Q. Well, where did you get it? I understood you to tell me this morning you got it off of the certified copy of the payroll. Now I understand

(Testimony of Elizabeth Callahan.)

you didn't. Now, where did you get the information in your item 1?

A. Off the superintendent's payroll.

Q. Where is that?

A. Now, this is the original payroll in here, in this case.

Q. All right; what laborers did you include, or what classifications did you include in your item 1; can you tell me that?

A. Classifications?

Q. Well, Miss Callaghan, you yourself made up Exhibit 91, did you not?

A. Yes, sir.

Q. All right. Now, in making it up, as I understood you to say, you went over the payroll and took figures off of [2293] that payroll and totalled them to get the figure shown here, item 1, or 91?

A. Yes.

Q. Now, I want to know what classifications or items did you take off of your payroll and total up in item 1?

A. Some of them are carpenters, some of them are carpenter foremen, and some of them are truck drivers, some of them are cement finishers, some of them are concrete laborers, concrete foremen, concrete clean-up.

Q. Concrete clean-up; do you know what this is, or how big an item it is?

A. Oh, it's just along toward the last of the job.

Q. Well, in making your computation, then, you took the laborers and foremen and so forth that had the word "concrete" in front of them; is that

(Testimony of Elizabeth Callahan.)

the designation that indicated to you which ones to take off of the payroll?

A. No; they're marked.

Q. How are they marked?

A. Well, they're marked as they went along.

Q. What mark, what designation? What is there on the payroll that indicated to you that you should charge that up to the concrete work on 1068?

A. Well, there is a red line. I also went through the daily reports. [2294]

Q. Is that the identification, the red mark?

A. Yes.

Q. And was that put on there currently as the payrolls came in?

A. They were usually put on from week to week, as Mr. Burnsted came over after the week.

Q. In other words, Mr. Burnsted would come in to Seattle at the end of the week and bring the payroll with him?

A. No, he mailed it in.

Q. He mailed it in after it was made up?

A. Yes.

Q. And then he came over how much later, after that?

A. Oh, I couldn't say exactly. Mr. Burnsted used to come in quite frequently.

Q. And then he went over the payroll and made a red ring around the labor that was to be charged to that portion of 1068 covered by the Concrete Construction Company sub-contract?

A. That's right, and we checked with the daily reports.

(Testimony of Elizabeth Callahan.)

Q. Could I have that, please?

A. Which do you want?

Q. I want the actual documents from which you made up this item of \$49,000.00——

A. In other words, you want all my payrolls?

Q. Well, I don't know. I want whatever you made it up from. [2295] Now, Miss Callahan, on item 3 of your Exhibit 91 you show the rental of equipment from H. H. Walker, and handing you the folder on item 3, it is a fact, is it not, that that covers the rental on a frame and boom truck, also on a 1941 Ford truck?

A. I would have to tell you by invoice number.

Q. Well, how did you do it when you made up your statement?      A. By invoice number.

Q. Can you show me what designation there was to show you whether those trucks were used on the concrete work, or on some other portion of 1068?

A. I asked about them.

Q. Who did you ask?

A. I asked Mr. Burnsted and Mr. Maceri both.

Q. So in making up item 3, then, that figure is based not on the invoices in your possession, but upon information given to you by Mr. Burnsted and Mr. Maceri?

A. Well, they're based on these invoices that they told me to charge to concrete.

Q. Do they include all of the invoices?

A. No.

Q. On trucks?      A. No.



(Testimony of Elizabeth Callahan.)

Q. So in making it up, then, you based that on those invoices which Mr. Burnsted and Mr. Macri said should be [2296] charged to the concrete work?

A. That's right.

Q. Now, you yourself in making up the statement, of course, had no personal knowledge and there was nothing on the invoices themselves to indicate where the trucks were used, or for what purpose?

A. I don't believe so.

Q. What folder did I hand you, Miss Callahan?

A. Number 3.

The Clerk: That is number 3 of her designation, but there's another designation at the bottom there, where I've marked it Macri's identification 106.

The Court: The court will recess for ten minutes.

(Short recess.)

### Cross-Examination

(Continued)

By Mr. Olson:

Q. Now, taking item 5, Martin & Son, ready-mix concrete, \$8,750.00, now, as I understand it, that's the amount that was paid out on a sub-contract?

A. Yes.

Q. Did you actually pay that amount to Martin & Son?

A. The checks he paid him, plus the back charges.

Q. How much did you actually pay him?

A. Well, you have the folder.

(Testimony of Elizabeth Callahan.)

Q. Well, Macri didn't pay him \$8,750.00 did he?

A. I say, that is the amount of the checks plus the back [2297] charges.

Q. Just answer the question, Miss Callahan; Macri and Company did not pay Martin & Son \$8,750.00?

A. Actual checks, you mean?

Q. I'm asking if you paid it to him?

A. Not actual checks, no.

Q. And you actually made back charges or deductions of \$2,273.45 from him, didn't you?

A. I couldn't quote those figures without the statement.

Q. I'll hand you Macri's identification 107, and ask you if it isn't a fact that the amount of money that was paid to Martin & Son was \$8,750.00 less those back charges; can you look at that and tell me how much you did pay Martin & Son? You've got it recapitulated there, have you not, on that yellow sheet?

A. Yes, but it is a little different from what you want. I have his gross earnings here, and the gross due, retained percentage, back charges.

Q. Well, back charges, what do they total?

A. \$2,273.45.

Q. Now, that amount was not included in any checks paid to Martin & Son, was it? In other words, you held that out of Martin & Son's checks, didn't you?

A. Yes.

Q. Yes. Now, handing you part of the same 107, and drawing [2298] your attention to a letter

(Testimony of Elizabeth Callahan.)

dated June 18, 1946, by Macri and Company, I will ask you if there were not some additional deductions made, other than the charge-backs?

A. There is the charge-backs, and the 10 per cent retention, and the penalties listed here; is that what you mean?

Q. Well, here, Miss Callahan. This letter shows there was \$854.21 due Martin & Son after you had deducted \$2,273.45 for charge backs, does it not?

A. Yes.

Q. And did you pay that to them? A. No.

Q. No; and what was the reason you didn't pay him? A. I was instructed not to.

Q. You were instructed not to; so, then, in addition to not paying Martin & Son \$2,273.45, there is also an additional \$854.21 out of this \$8,750.00 that you did not pay Martin & Son; that's true, is it not? A. That's true.

Q. Or a total of \$3,127.66, so that the actual amount of your checks to Martin & Son is \$5,622.34, is that correct? A. I have \$5,622.37.

Q. All right, 37 cents. Now, in addition to that you've billed, have you not, Martin & Son for how much money, referred to on your letter there?

A. Credit balance, Macri & Company——

Q. Yes; how much do you say that Martin & Son owes you now? A. \$7,829.02.

Q. That's about \$2300.00 more than you paid him, isn't it?

A. I haven't figured that out.

(Testimony of Elizabeth Callahan.)

Q. Well, it is approximately \$2300.00 more than you paid him altogether?

A. About that, more than the actual checks.

Q. Now, that statement of the account with Martin & Son is not revealed anywhere on your Exhibit 91, is it, Miss Callahan?

A. Just as gross earnings from the final estimate, is all.

Q. I say, the statement of the figures which I have just questioned you about does not appear any place as Exhibit 91?

A. No, just that part of it that's gross earnings.

Q. And part of those charge backs are for labor which Macri performed and which you claim that Martin & Son should have performed, is that true; or do you know what the charge backs are?

A. Oh, I would have to go through that; there are a lot of bills for equipment rental and a lot of different things.

Q. So you don't know what the charge backs are, now, do you?

A. I've been through them. I don't remember them. There's a great many of them.

Q. All right. Has Martin & Son yet paid that bill that you [2300] rendered to them?

A. Not to my knowledge. You would really have to ask Mr. Macri that.

Q. It may have been paid, or may not?

A. As far as I know; I don't think so.



(Testimony of Elizabeth Callahan.)

Q. Now, with reference to your item 6, you made that up from Macri's identification 108, the material contained in that, is that correct?

A. Yes.

Q. Now, would you look at the invoice dated February 28, 1945, Potlatch Yards?

A. Do you have the invoice number?

Q. No. I'll find it for you, though. Here. Now, that item there is included in your compilation, is it not, as a part of item 6 on your Exhibit 91? A. Yes.

Q. And what does that invoice cover? What does it call for?

Mr. Holman: Would you give us the date, or something, Mr. Olson?

Mr. Olson: I did; February 28, 1945, Potlatch Yards.

Witness: 2090 pounds AEN nut; war tax.

Q. What is that? A. I have no idea.

Q. Well, why did you include it in your compilation, if you [2301] have no idea what it is?

A. Because it is on my list of invoice numbers.

Q. Well, who made up your list of invoice numbers? A. I did.

Q. Well, why did you include that invoice, if you don't know what it is?

A. Because I was told to.

Q. And who told you to?

A. In this case it was either Mr. Macri or Mr. Burnsted.

(Testimony of Elizabeth Callahan.)

Q. All right; now look at your invoice under April 30, 1945.

The Court: What was the amount of the item your referred to there?

A. \$23.05. April what, please?

Q. April 30, 1945.

A. There are two invoices on that date.

Q. Well, the one that has the nut on it, 1910 pounds BC nut. A. Yes.

Q. \$12.60. A. Yes.

Q. Do you know whether or not that item is coal, nut coal?

A. I don't know; it's on my list.

Q. And do you know whether or not the previous invoice is for nut coal? A. No, I don't.

Q. Why did you include that item in making up your Exhibit [2302] 91?

A. It was given to me to include.

Q. Then isn't it a fact, Miss Callahan, in making up this compilation, 91, you simply put down on it what somebody told you to put down?

A. To some extent, yes.

Q. Handing you folder number 10, which is Macri's 112, Miss Callahan, that is the material from which you made up item 10 on your Exhibit 91, is it not? A. Yes.

Q. Now, that's for Sealeure and freight?

A. Yes.

Q. Total of \$679.76; now, that includes, does it not, the gross bills for those items?

A. Do you mean all the bills in here?

(Testimony of Elizabeth Callahan.)

Q. No; it includes the gross bills for Sealcure and freight, including the barrels that the Sealcure came in?

A. Yes, it includes that.

Q. And have you shown anyplace a credit against that account for the barrels returned?

A. Yes, it's taken off in the payment of it.

Q. And can you show me where?

A. These are just the amounts actually paid on these three bills.

Q. But that includes the barrels, for which you get a credit [2303] when they're returned, as shown on the invoices themselves, does it not?

A. If they're returned, yes.

Q. Well, if the invoices themselves, from which you made up your compilation, show a return credit of approximately \$13.00 a barrel, if the barrels are returned——

A. If they are returned.

Q. And you gave no credit, did you?

A. I don't have any credit for them being returned.

Q. So if the barrels were not returned then you still have the barrels, then; or do you know?

A. I wouldn't know whether they're still on the job or not.

Q. At least you gave no credit for the barrels?

A. No.

Q. And each one of these invoices show a return credit coming, and allowable upon return of the barrels?

A. If they are returned, yes.

Q. And that shows right on the invoice from which you made up this item?

A. But there is no credit.

(Testimony of Elizabeth Callahan.)

Q. There is no credit shown in that file, at any rate? A. No.

The Court: Does the invoice indicate how many barrels were involved? A. Yes. [2304]

Q. Do you have it, Miss Callahan, the number of barrels?

A. On invoice 7374 it is four. On invoice 7373 it is two. On invoice 8131, one. On invoice 575, three. Invoice 3988, two.

Q. How many is this one, now?

A. 3988, two.

Q. That's twelve of them, then? A. Yes.

Q. Now, your next item, unloading cement from cars and placing on job, Glen Gentry and Harvey Hofsted, \$259.20; now, that item was charged against Martin & Son, was it not, and deducted from them?

A. I don't know whether the whole amount was or not. I'd have to look. Do you have the statement?

Q. Well, handing you Macri's identification 115, and drawing your attention to the notations on the top three sheets upon which is written "Verbal orders don't go; write it"; does not the notation thereon appear to charge that to Sam Martin & Son?

A. Burnsted has written on here "Charge back to Martin & Son."

Q. To charge it to Martin & Son?

A. Yes.



(Testimony of Elizabeth Callahan.)

Q. And you did that, didn't you?

A. I don't know. I'd have to look at the statement and see.

Q. Well, do you know whether or not that was charged back? [2303]

A. Not without looking at the statement. I don't see that amount on it.

Q. Well, drawing your attention to part of your folder 5, part of a letter dated July 26, 1945, being part of Macri's identification 107, do you not have those same items there, \$71.27, which is the same as a charge back against Martin & Son as directed by Sam Burnsted? A. There's \$218.87.

Q. Well, those items I just showed you, Miss Callahan, don't all three of them appear right there as a charge back against Martin & Son?

A. Where.

Q. \$71.27, which is the item you show here, and which is a part of your \$211.51; the next one is \$68.97—do you find that on there? A. No.

Q. The next one is \$71.27. Do you see that on there again? A. There's one on here, yes.

Q. Now, this \$259.20, is that those same items that you charged back against Martin & Son, or do you know?

A. I don't think it is. There is \$602.98 worth here.

Q. Well, do you know whether it is the same or not, Miss Callahan? A. I don't believe it is.

Q. You do not believe it is. Well, did you or did you not [2306] follow the directions that are given

(Testimony of Elizabeth Callahan.)

on here, on part of Maceri's 115, to charge that back to Martin & Son?

A. I don't know that I did.

Q. On Maceri's 116, would you find the O.P.A. truck value or rental value from which you testified you got item A, on 4?

A. On which I did on which item, or on all of them?

Q. Do you understand, Miss Callahan?

A. On which item?

Q. On subdivision A of item 4, you've got truck rental, 8 months at \$250.00 per month, \$2,000.00, and I understood you got it out of that O.P.A. rent book.

A. No, that is not listed as out of the O.P.A. rent book; the rest of them are. It was my understanding that that is not covered in the O.P.A. book.

Q. So that out of your item of \$2,920.00, there is \$2,000.00 of it that's not based on the O.P.A. rent book, is it?

A. A is not; B and C are.

Q. So that \$2,000.00 out of your \$2,920.20 is not based on an O.P.A. book?

A. That's correct, is isn't covered.

Mr. Olson: That's all.

#### Redirect Examination

By Mr. Holman:

Q. Will you tell me, please, where the rental for \$2,000.00 on item 4 for the truck was arrived at—how you got that [2307] rate of \$250.00 per month?

(Testimony of Elizabeth Callahan.)

Mr. Olson: Objected to as not being proper re-direct examination, your Honor. The witness testified on direct examination that that rental value was out of an O.P.A. rental book; now she testifies that \$2,000.00 of it was not.

The Court: Overruled. She may explain.

Q. (By Mr. Holman): I would like to understand where you did get it, or do you know?

A. On item 4 as listed on the statement, A is not listed as out of the O.P.A. rental book. I thought that was understood. B and C have the page number.

Q. Where did you get the \$250.00 per month for 8 months to calculate the \$2,000.00?

A. The amount of \$250.00 a month was given to me by our accountant after calling the O.P.A. and several other sources which I could not testify to.

Q. Then you have no basis for the \$250.00 a month, of your own investigation?

A. No; I couldn't find it in the book; it isn't covered.

Q. Do I understand, Miss Callahan, with reference to item 10, that there is a total of 12 barrels listed, and that was \$13.00 a barrel; was the \$13.00 a barrel for returned barrels on the Pioneer Sand & Gravel?

A. Well, there is a credit value for their return.

Q. All I wanted was the amount per barrel. Can you tell me that off of this bill?

A. I think so. I think that depends on the size of the barrel. It's \$6.00 here.

(Testimony of Elizabeth Callahan.)

Q. Well, are these credits?

A. No, because it hasn't been returned. It is a charge for the barrel.

Q. Well, then, the amount of charge there would be the value of the particular barrel?

A. That's right.

Q. Well, each of those that counsel called you has a \$6.00 charge amount, has it not, Miss Callahan? You look them over.

A. Yes, charged \$6.00 a barrel.

Q. Then if the barrels were returned you would get a credit of \$72.00 for the 12 of them, is that correct?

A. Yes.

Q. And you have no evidence of any return?

A. No, I don't.

Mr. Holman: Then, your Honor, the defendants Macri are willing and ready to concede there should be a credit there of \$12.00 times 6 (12 times \$6.00) or \$72.00. It's just a correction, certainly.

The Court: Very well.

Q. (By Mr. Holman): With reference to item 5, Martin & Son, the [2309] ready-mix concrete, you say the gross \$8,750.00 was the gross earnings; isn't that what you told counsel?

A. That is correct.

Q. Now, was all of that amount of \$8,750.00 either paid by cash or by charge for credits due Macri and Company on other matters?

Mr. Olson: That question is objected to as being leading.

The Court: Sustained.



(Testimony of Elizabeth Callahan.)

Q. (By Mr. Holman): Well, how was it paid, Miss Callahan? In other words, the \$8,750.00, the amount that Mr. Maceri had in this job for performance by Martin & Son—or do you understand?

Mr. Olson: The question is still leading, your Honor.

Mr. Holman: Well, I'm trying to identify that item, your Honor. It may be leading, and I'm not suggesting an answer to her.

Mr. Olson: Well, I'm objecting to the question.

The Court: Well, I think it is still somewhat leading. Can't she explain how she made up that item?

Q. (By Mr. Holman): You have here \$8,750.00, on Exhibit 91, for Martin & Son, and you told counsel that was gross earnings? A. That's right.

Q. And I believe you told counsel you paid ultimately a [2310] check of \$5,622.37, correct?

A. Several checks.

Q. Several checks comprising that?

A. Yes.

Q. Well, what is the difference as to whether or not there was something besides this concrete work, or was it out of the concrete work? In other words, the difference between \$8,750.00, and the \$5,622.37, what is that made up of?

A. Back charges.

Q. Well, what do you mean by back charges, Miss Callahan?

A. Well, I could give you a general idea.

(Testimony of Elizabeth Callahan.)

Q. If you'll do that, please.

A. But the exact picture, I'd have to get my file.

The Court: Suppose we try the general first, and let's see if somebody insists on the particular.

Q. Very well, give the general idea, will you?

A. There are items of charge backs on things that Martin owed us in some cases, rental in some cases, men, in man hours, that we gave them, equipment that we either—when I say equipment I mean small bills that we paid and the foreman forwarded to me to charge back to them; it is a lot of miscellaneous charges, and that come out of the money that we owed them.

Q. Well, then, is this \$8,750.00 a correct amount of what [2311] was paid either by cash or by charge for other matters to Martin & Son?

Mr. Olson: Same objection, your Honor. That certainly is a leading question.

The Court: It is leading, but that's what she testified. Is it a summary.

Q. In other words, what I want to know, Miss Callahan, is whether or not \$8,750.00 is the amount that Martin & Son put into this 1068?

A. Yes, it's his gross earnings.

Mr. Holman: That's all, your Honor.

#### Recross-Examination

By Mr. Olson:

Q. Miss Callahan, getting back to this same figure, then, on your item 5, is it not a fact that

(Testimony of Elizabeth Callahan.)

\$854.21 of that amount is not a charge back, is not for any services which you claim to have rendered Martin & Son, but is simply the amount of money that you didn't pay him?      A. No.

Q. That is not a fact?

A. That is not a fact.

Q. Well, give me item 5 again, then. Drawing your attention to a letter dated June 18, 1946, the item of \$854.21, that letter shows that that amount after all your charge backs is still due Martin & Son, does it not?      A. Yes. [2312]

Q. And then you assessed against him a penalty that was assessed against you, Macri and Company, on 1068, and for that reason did not pay him that \$854.21?

A. That is what offsets the \$854.21.

Q. And that wasn't held off because of a charge back for any kind of services rendered?

A. It is charged back right there.

Q. But because you assessed against Martin & Son the entire penalty on 1068 for late performance?      A. Oh, no.

Q. The letter shows that you did that, didn't you, Miss Callahan? In that letter you assessed against Martin & Son the entire penalty for late performance on 1068?

A. I couldn't quote you off hand.

Q. What is the amount you charged against Martin & Son?      A. \$8,683.23.

Q. That's all assessed against Martin & Son, isn't it?      A. It is, in this letter.

(Testimony of Elizabeth Callahan.)

Q. And 854.21 of it has been paid to you by virtue of your holding it out of Martin & Son's money?

A. Well, I don't quite know how you figure that.

Q. Well, were it not for the penalty you would have paid Martin & Son that \$854.21?

A. Yes, but you see, it is subtracted right here.

Q. Yes. [2313]

A. The difference between \$854.21 and \$8,683.23 leaves a balance of \$7,829.02.

Q. So there's been \$854.21 out of the penalty that Macri & Company has been re-imbursed out of Martin & Son's money? Now, just answer that question, isn't that so?

A. That you would have to take up with Mr. Macri. I don't know that it's been completely settled.

Q. Well, Miss Callahan, you're the one that made up this statement, 91? A. Yes.

Q. And you made it up from the records, part of which you now hold in your hands?

A. Yes.

Q. And do not those records show that except for the penalty, even after charging out \$2,273.45 charge backs, Martin & Son, instead, would still have had coming to them \$854.21, isn't that just exactly what that shows?

A. Yes, without the penalty.

Q. And you didn't pay it to him, did you?

A. Didn't.



(Testimony of Elizabeth Callahan.)

Q. And you credited it on the penalty which was assessed against Martin & Son of over \$8,000.00?

A. Yes.

Q. Thank you. Now, these other items, these charge backs of \$2,273.45, and you may wish to refer to this, so I'll [2314] let you keep it, a good deal of that represents labor, you say, that you furnished Martin & Son?

A. I said some of it represented in man hours.

Q. Now, where do those man hours appear on your payroll?

A. I don't think I understand that.

Q. Well, do you know what man hours, what labor it was that was furnished to Martin & Son?

A. Yes, that information was furnished to me, some of it by Mr. Burnsted, some by Mr. Black; some of it is labor, some of it is cash, a lot of different things.

Q. Now, the labor that you charged back against Martin & Son is labor that was furnished right out on the job, is it not?

A. I couldn't say as to that.

Q. And you can't say whether or not that labor you have charged back against Martin & Son is also included in your item 1, could you?

A. Everything in item 1 is concrete work. These other lists were furnished to me by the superintendent. That was between Martin and the superintendent.

Mr. Olson: That's all.

(Testimony of Elizabeth Callahan.)

Redirect Examination

By Mr. Holman:

Q. Miss Callahan, may I understand whether the penalty, \$8,683.23, was paid or deducted from Macri? Was it a cash transaction? [2315]

A. It is deducted from Macri & Company on the estimate, as liquidated damages.

Q. You have no entry of any penalty on 1068 charged to Concrete Construction Company, have you?

Mr. Olson: The question is objected to as being leading.

Mr. Holman: Yes, it speaks for itself. Strike the question.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, Summons, complaint and writ of garnishment, cause No. 381592, King County Superior Court, was marked defendants Goerig & Philp Exhibit No. 122 for identification.)

Mr. Hawkins: Your Honor, while we're pausing here the Clerk tells me that that summons and complaint Goerig and Philp's Exhibit 2 in case number 257, has not been formally offered or received in evidence in this case. I understood from counsel's remarks that this was to be considered in

evidence, that he wanted this in evidence before he removed his objection to the assignment.

Mr. Holman: I didn't want either in evidence. I said if they went in evidence, they should be together.

The Court: The other has been admitted. [2316]

Mr. Hawkins: And counsel and I thought this had been.

The Court: You offer it now?

Mr. Hawkins: Yes.

The Court: It will be admitted.

(Whereupon, defendants Goerig & Philp Exhibit No. 122 for identification was admitted in evidence.)

Mr. Holman: I'm satisfied the record shows the previous objections.

The Court: Yes, you wish the record to show the same objections you made to the other offer.

Mr. Holman: I rest, your Honor, on the defense and on the cross-complaint on 1068.

The Clerk: I'm just wondering before Mr. Holman did that if I might call his attention to some identifications here, your Honor?

The Court: Yes, all right.

The Clerk: There's a number of identifications here, the payrolls and so forth, that have not been offered in evidence.

Mr. Holman: 54, your Honor, I understood it was made up to show the time of Mr. Stickney complete on the job, as receiving \$1700.00, and I

was under the impression that had been offered and rejected on counsel's [2317] objection. If not, I'll withdraw it.

The Court: All right.

Mr. Holman: Macri's 65 for identification, your Honor, is a communication to Macri and Company from the Shell Oil Company, with bill attached, and that no longer becomes pertinent because of the statements which are involved, so I will withdraw that. Macri's 66 is in exactly the same category, with respect to Central Service Station, and that, under the pre-trial, is no longer in issue.

The Court: You wish to withdraw that, 66?

Mr. Holman: Yes, 66. Macri's identification 73——

The Clerk: Has been rejected.

Mr. Holman: ——I understood was a rejected exhibit. I got that from counsel, and I would request at least a copy of that. Macri's 72, I would like to keep in until the very last of the case, to see whether or not there is a photostatic copy furnished as requested from the witness Hunter. As to 78, I would like to call Mr. Schaefer to the stand to identify some handwriting, your Honor.

The Court: All right. [2318]



M. C. SCHAEFER

the plaintiff, recalled for further cross-examination, testified as follows:

Cross-Examination

By Mr. Holman:

Q. Handing you identification 78, will you tell me whether or not the handwriting on the slip attached thereto, and the figures attached thereto, are your handwriting?           A. They are.

Q. And is it or is it not a fact that those were the figures you furnished Mr. Macri for the purpose of fixing the items to bid upon under the subcontract on 1068?           A. Correct.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: I offer 78 in evidence, your Honor. Your Honor will recall that 78 came from half of the slip upon which the tabulation of 77 came from.

Mr. Olson: Your Honor, I don't see the purpose or the materiality or the competency of identification 78. We have a written contract that was entered into on 1068, which sets forth the values, the amounts per board feet, and there is no inconsistency between them, and I submit that it has no—even if it was inconsistent it could not change the contract.

Mr. Holman: It is offered, your Honor, for probative force in connection with counsel's own

questioning of Mr. Macri as an adverse witness, as part of his case, as to the preparation and the signing of the contract on 1068.

The Court: What is the evidence as to when this was given to Mr. Macri?

Mr. Holman: I have it only that this is the witness' own handwriting.

The Court: I wondered what the testimony showed. I don't remember as to when it was given.

Mr. Holman: It came into the case this way, your Honor; that Mr. Macri brought his slip of paper out upon which showed what is now exhibit 76 (77) upon which he had some tallies on some forms, I think he said it covered [2319] 70 forms, something like that, and that was on a piece of paper folded over, and that was on the other side of that. He testified that those were figures which Mr. Schaefer gave him. Now I'm having Mr. Schaefer identify it.

The Court: Well, I'll overrule the objection and let it in for what it is worth.

(Whereupon, defendant Macri's Exhibit No. 78 for identification was admitted in evidence.)

The Clerk: There were three documents marked and handed to you, Black's daily foreman's report and the structure lay-outs on 1068; in wooden covers.

Mr. Holman: Yes; I would again offer those for the purpose of Macri's 80, daily report of Black throughout 1068, and Macri's 82 for identification

and 81 for identification, which were identified by the witness Black while on the stand as his field operations and his notes throughout 1068. Those were previously offered and objected to by counsel, and I submit they are part of the detail of the proof of performance on 1068.

The Court: Well, there's no question but what Schaefer didn't perform any part of it, and you performed it all, is there?

Mr. Holman: That's correct, your Honor.

The Court: And they don't have any bearing on [2320] the amount of the cost or the amount of damages you claim, do they? Perhaps I'm premature; is there objection?

Mr. Olson: Yes, your Honor. I understand your Honor already rejected the exhibits. We argued at length, and they were rejected, as I remember it.

Mr. Holman: I think not.

The Court: My notes don't show rejected. I'll have to look at them.

Mr. Olson: Am I right, counsel, that those are daily reports made by Mr. Black?

Mr. Holman: It is his diary on job 1068, yes.

Mr. Olson: I object to the document. Assuming that some of the contents might be favorable to them, I don't know that they are, but if they were, it would be a self-serving document, your Honor. It would be hearsay as far as we're concerned.

The Court: Objection will be sustained as to 80. 81 is the lay-out plans on 1068.

Mr. Olson: I don't care if they go in, structure lay-out plans.

The Court: Admitted, then.

(Whereupon, defendant Macri's Exhibit No. 81 for identification was admitted in evidence.)

Mr. Olson: I take it those are Bureau of Reclamation [2321] official plans, Mr. Holman?

Mr. Holman: Yes, Mr. Black I am satisfied so testified and identified them.

The Court: This is marked "Structure lay-out"; is it a duplication?

Mr. Holman: He designated the two as being the set he worked from.

Mr. Olson: Your Honor, I'd have to submit them to someone more competent than myself. I have no objection to an official copy of the structure lay-out plans on 1068 going in, except that I'd like to know that that's what it is.

Mr. Holman: Well, I have only the testimony of the witness Black, your Honor, and except for a historical and graphic explanation of 1068, as to the scope of the work, there would be no object in having them in. At least I want to be in a position of offering them.

The Court: Well, I'll admit them with the reservation that if counsel wishes to have them checked, and on checking them he can raise an objection subsequently if they're not the proper lay-out plans pertaining to 1068.

(Whereupon, defendant Macri's Exhibit No. 82 for identification was admitted in evidence.)



The Clerk: All right, then there is 87, 88 and 89, [2322] three separate sheets, some sort of an invoice that you asked to keep for the time being.

Mr. Holman: Those are withdrawn. 86, your Honor, is the one bearing "S.R.K.," which Mr. Macri testified was the initials of Mr. King, and dated November 20, 1944. Mr. King is not here to testify. 87 is one dated August 3, 1944, and has to do with a number of sacks of cement just being received, I take it, on 1068, and 88 is August 3, 1944, signed by Ashley, with respect to sacks of cement, and those were not produced at the time Mr. Ashley was here, so that I could have those identified by him, and 89 is some tabulations which were withdrawn, or which I will withdraw.

The Clerk: I think that's all so far as the defendant is concerned.

Mr. Holman: Now, on the government exhibits, they were listed right down the line, were they not?

The Clerk: Starting with number 13.

Mr. Holman: Daily reports of inspectors; those are the ones that copies are being made of.

The Clerk: I've got those made up and ready to substitute now.

Mr. Holman: I ask those copies be marked and substituted, your Honor, so that when the originals are [2323] returned, the copies will be here.

The Court: All right, the originals will be released, then.

Mr. Holman: 14, a monthly estimate of progress for compensation.

The Clerk: 14 is in evidence, and copies being made of that.

Mr. Olson: Did your Honor admit 13-a to 13-o; are those admitted?

The Court: Yes.

Mr. Olson: I'm not sure; I wasn't following counsel too closely; are you offering those now?

The Court: No, they have been admitted. He's asking that the copies which the clerk has made be substituted, and that he be permitted to withdraw the originals.

Mr. Holman: 15 is the Macri payroll, and in lieu of that there is one portion of the payroll which has been admitted in evidence as 15-a, so that the Macri payroll so far as the Macris are concerned can be returned.

The Clerk: 16 is Schaefer weekly payroll reports; that's from the Bureau.

Mr. Holman: That's the Schaefer payroll. The same on that. We have not offered that. We had it marked for identification, and we do not offer it. 17, [2324] the monthly control reports, there's been no testimony on that, your Honor, except by Mr. Pease. 18, concrete inspectors' daily reports, XD 1975, is in the same category.

The Clerk: You're asking for those to be withdrawn?

Mr. Holman: Yes, returned to the government, and 19, the daily reports of the inspectors on contract 1068—I'm not sure about that.

The Clerk: It is on specification 1068.

Mr. Holman: That, your Honor, is not offered.

The Court: All right.

Mr. Holman: Monthly estimates of progress for compensation on 1068 is in as Exhibit 20.

The Clerk: With copies being made to substitute.

Mr. Holman: The Macri payroll on 1068 is now offered, your Honor, as part of Macri's case on 1068, in view of the cross-examination by counsel of Miss Callahan as to the items thereof.

Mr. Olson: Your Honor, we object to it on the ground that it is immaterial, irrelevant, on the further ground it is not the document from which the exhibit was made.

Mr. Holman: Oh, this is the government's payroll.

Mr. Olson: It is not the government's payroll; [2325] it is a certified copy of Macri's payroll, furnished the government.

Mr. Holman: It is Macri's 21, produced by Mr. Pease, your Honor, and copies would have to be made.

The Court: If I remember, the cross-examination was on some other payroll that she said showed in some way, marked with a red circle to show they had worked on the concrete work.

Mr. Holman: Yes, but in her testimony she referred to this payroll.

The Court: Yes; it appeared, it seems to me, from her cross-examination, that it wasn't made up from this, but was made from another payroll marked with a red circle. I'll sustain an objection to this. I don't believe it is material.

Mr. Holman: That seems to cover all those items, Mr. LaFramboise.

The Clerk: I believe it does. There is one other item I want to call attention to; that was Macri's identification 55, which was a copy, part of the Macri payroll, that you had Miss Callahan identify as having omitted certain parts of it, excepting for the first page. You took that out to have her recopy it, and when she came back, she had re-copied the whole thing, and it is now marked and admitted as 15-a. [2326]

Mr. Holman: Then I'll withdraw that. In other words, the whole thing is in.

The Court: The defendants Macri rest, then?

Mr. Holman: Yes, your Honor, as defendants and as cross-complainants.

The Court: Yes.

Mr. Hawkins: I wonder if I might check our identifications. I think the two joint venture agreements are in evidence.

The Clerk: That's right.

Mr. Hawkins: The termination agreement is in evidence.

The Clerk: That's right.

Mr. Hawkins: The assignment is in evidence?

The Clerk: That's right.

Mr. Hawkins: And the summons and complaint is in evidence. Then we have no further testimony to offer, and rest at this time.

The Court: Have you anything to offer, Mr. Ivy?

Mr. Ivy: No, your Honor; we rest.



The Court: Would you prefer to go ahead?

Mr. Olson: It is immaterial; we can go ahead.  
It is 4:30.

Mr. Holman: I would like to make some offers as against counsel's letters, your Honor, that were introduced [2327] in the testimony of Mr. Schaefer.

The Court: Well, I thought you had rested.

Mr. Holman: Now, this is in rebuttal, your Honor. Mr. Schaefer was called in rebuttal, your Honor will recall that counsel proceeded a little bit on rebuttal, and had some additional identifications marked. I called your Honor's attention to some, and your Honor said I could wait.

The Court: Yes, you've rested your case, and Mr. Olson is going on in rebuttal.

Mr. Holman: He started before Mr. Klugg got here, out of turn.

The Court: But the point is, I don't see why you should make any offers except on cross-examination, until he gets through with his rebuttal.

Mr. Holman: I thought you just wanted to use this five or ten minutes, your Honor. No, that's right.

The Court: If you want to make some offers in connection with cross-examination of a witness, that's all right, but I think you should wait until he gets through.

Mr. Holman: I had only in mind that we had nothing to do.

Mr. Olson: Are we going to stop at 4:30?

The Court: No, I think we'll go until quarter to five. [2328]

M. C. SCHAFER

the plaintiff, recalled as a witness in his own behalf, in further rebuttal, testified as follows:

Direct Examination

By Mr. Olson:

Q. Mr. Schaefer, handing you plaintiff's Exhibit 5, being the sub-contract covering job 1062, I think you testified already that that was signed, or where was it signed, Mr. Schaefer?

Mr. Holman: Object as having been already covered by the witness, your Honor, on the case in chief.

Mr. Olson: I think he did.

Mr. Holman: Both 1062 and 1068.

The Court: I thought he testified to that.

Mr. Olson: I'm just leading up to another question.

The Court: All right, go ahead.

Q. That was signed where? [2329]

A. This was signed at Mr. Macri's residence.

The Court: What is that?

A. 1062, plaintiff's Exhibit 5.

Q. Drawing your attention to the X-d out portion of the typewritten portion of page numbered 1 on the contract, being a part of Article 1, I'll ask you if that was X-d out in your presence?

A. It was not.

Q. Did you see that contract before that portion of it was X-d out, or was that X-d out already when it was presented to you for signing?

(Testimony of M. C. Schaefer.)

A. That was X-d out before I saw it, before——

Q. Before what?

A. Before I saw it; before I signed it.

Q. I didn't get whether you said before you saw, or signed, it.

A. It was X-d out——

Q. Yes.

A. Before I saw or signed the contract.

Q. Did you have any discussion with Mr. Macri concerning the material, or concerning the striking out of that material, at all?

A. No, I did not.

Q. Now, handing you plaintiff's Exhibit 6, I'll ask you whether or not you directed in any particular to Mr. [2330] Hjorth——

Mr. Holman: I object. to this as all having been covered in the case in chief.

The Court: What is this, now, 1068?

Mr. Olson: Yes.

The Court: I'll overrule the objection.

Q. ——to Mr. Hjorth or Mr. Macri any of the particulars of the contents of any of the two sub-contracts, Exhibits 5 or 6?

A. I did not. On this contract here, I filled in the part, wrote the part, that says "If bond is required, general contractor to pay the premium."

Q. Where did you fill that in; where were you?

A. It was at the Stadium Homes job office.

Mr. Holman: Your Honor, I move that that all be stricken as having been covered in plaintiff's case in chief.

The Court: Denied.

(Testimony of M. C. Schaefer.)

Q. Mr. Schaefer, at the time that you signed the contract on 1062 did you advise Mr. Macri that you just wanted a foot clearance in the excavations?

Mr. Holman: Just a minute. I object to that question as exceedingly leading and suggestive, your Honor.

The Court: Well, it is your contention that [2331] that's what Mr. Macri testified?

Mr. Olson: He testified, according to my notes, and I think that's correct, that that's what Mr. Schaefer told him.

The Court: I think you can direct his attention to what was testified. I'll overrule the objection.

Witness: I did not. We had no conversation about the excavating at that time.

Q. Did you at any time make such a statement to Mr. Macri? A. I did not.

Q. Did you at that time, speaking of the time that you signed the contract on 1062, have a discussion with Mr. Macri in which the Mixomobile was discussed, and Mr. Macri said that your Mixomobile was too big? A. There was no such——

Mr. Holman: Just a minute. I submit these are exceedingly leading and improper questions. The way, as I understand it, is if counsel with a witness fixes time, place, and persons present, for the purpose of impeachment, then he can refer to the particular testimony and ask this witness to say whether or not that occurred, but certainly counsel, your Honor, can't frame in his questions his own interpretation of the testimony of the witness, and then have this witness answer yes or no.



(Testimony of M. C. Schaefer.)

The Court: Well, it is an awkward thing to get [2332] at, as you discovered in your examination of some of the witnesses. It is difficult sometimes not to lead. I think if a witness says another one said something, he has a right to say he didn't do it.

Mr. Olson: Yes, your Honor. Counsel went into this at some length and asked his witnesses if they said so and so; Macri said Mr. Schaefer said these things.

Mr. Holman: May it please the Court, in each one of those instances with counsel's witnesses I asked him to fix time and place and persons present.

The Court: Will you read the question?

(Whereupon, the reporter read the last previous question.)

The Court: Overruled.

A. We never discussed the Mixomobile or any equipment at that time.

Q. Did Mr. Macri make such a statement to you?

A. He never did.

Q. Now, did Mr. Macri call you on or about the 14th of June, 1944, by telephone?

A. He did not.

(Whereupon, Schaefer telephone bill for June, 1944, was marked Plaintiff's Exhibit No. 123 for identification.)

Q. Now, showing you plaintiff's identification 123, Mr. [2333] Schaefer, I'll ask you to state what it is.

(Testimony of M. C. Schaefer.)

A. That is a telephone bill, including the toll slip, showing I called to Seattle to Mr. Macri.

Q. Well, does it show to Mr. Macri, or does it show to a number?

A. It shows to a number, and that was on June 14.

Mr. Olson: We offer, your Honor, plaintiff's identification 98 and plaintiff's identification 123, for the purpose of corroborating Mr. Schaefer's testimony that he called Mr. Macri on June 14 and arranged the June 15 meeting, and disproving Mr. Macri's testimony that he called Mr. Schaefer on June 14, 1944.

Mr. Holman: Well, no objection to it going in, your Honor, but not under counsel's statement it proves anything. It does show Mr. Schaefer 'phoned that Seneca number, which was disconnected, it is shown on 98 as disconnected, and that speaks of as now; I don't know about it then, and 123 does show a charge to Mr. Schaefer or to somebody, M. C. Schaefer as talking on June 14 to Seattle, for two calls to Seattle, one of them being that number, being the number shown on 98. If he's offering it as probative of this witness' testimony, I have no objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit [2334] No. 98 for identification was admitted in evidence.)

(Whereupon, Plaintiff's Exhibit No. 123 for identification was admitted in evidence.)

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, did you, Mr. Schaefer, in the course of the 'phone conversation with Mr. Macri on June 14, say to Mr. Macri in substance or effect that you would not go back on the job as long as Mr. Staples was on the job?       A. I did not.

Q. Or did you in substance or effect say to Mr. Macri at that time that you would not go back on the job until he fired Mr. Staples?

A. I did not.

Q. Did you at any time make in substance and effect either of those statements to Mr. Macri?

A. I did not.

Q. Did you have a conversation with Mr. Macri at some time about Mr. Staples? Just say whether you did or not.       A. Well, yes.

Q. Do you know approximately when it was?

A. The one time was June 15, at the June 15 meeting.

Q. And what was said between you and Mr. Macri?

A. The mention of Staples came in there this way: Mr. Macri said "You said Mr. Staples was a good man, and he can't [2335] handle it" to which I said "I've never said anything of the kind, but if he had had a little cooperation from you, I believe he'd have done a whole lot better."

(Testimony of M. C. Schaefer.)

Mr. Holman: Your Honor, I move that be stricken as having been the identical statement the witness made on the case in chief.

The Court: I can't remember that far back, whether he did or not.

Mr. Holman: Your Honor, on defense I asked both Staples and Macri, quoting this gentleman, the statement he's given right now.

The Court: I'll overrule the objection, or deny the motion.

Witness: Pardon me——

The Court: Wait until a question is asked, and then you answer the question.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. On April 29, 1944, Mr. Schaefer, did Mr. Staples state in substance to you, or did you have a conversation with Mr. Staples on or about April 29, 1944, relative to his calling, or failure to get in touch with Mr. Macri on the previous day?

A. Yes.

Mr. Holman: Just a moment. I object to that as having been covered in the case in chief. [2336]

The Court: It seems to me that these conversations on June 15 and 29th, whatever the date is, that they were fully covered on direct, and I don't believe it is proper for you to go generally into what was said there again, except to call this witness's attention to some specific statement that might have



(Testimony of M. C. Schaefer.)

been attributed to him, and call his attention to that and have him state whether or not he made the statement, but I don't believe you should go into these conversations again, generally.

Mr. Olson: I don't intend to. My recollection is that your Honor on objection of counsel sustained an objection to the witness testifying to this portion of a conversation with Mr. Staples as to his inability to get hold of Macri the previous date, that is, that he could, but Macri told him not to; then when Staples was on the stand I asked him if he had not on that date said to Mr. Schaefer that the previous day he knew how to get hold of Macri, but that Macri had told him not to.

Mr. Holman: I'll withdraw my objection, your Honor. Counsel is explaining his purpose.

Mr. Olson: The purpose of this is to impeach Staples in that statement.

The Court: Go ahead.

Direct Examination

(Continued)

By Mr. Olson:

Q. Did you have a conversation with Staples on the 29th relative [2337] to his ability or disability to get hold of Macri on the 28th?      A. I did.

Q. Will you state what it was?

A. After the meeting in the field I met Mr. Staples back at the office, and I asked him what those promises were going to amount to, and relative to this part of it, Staples said "I knew yes-

(Testimony of M. C. Schaefer.)

terday where to reach Mr. Macri, but Mr. Macri told me not to contact him unless I just had to, and when you told me you were going to gather up your equipment at noon today unless he got there, I just had to get in touch with Mr. Macri."

Mr. Holman: I move the answer be stricken as not responsive. Counsel asked him if he had conversation on the 28th; this was on the 29th.

Mr. Olson: No, I asked about the 29th.

The Court: I thought the question pertained to the 29th. I'll overrule the motion to strike.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, did you observe the hoe of Macri and Company in operation out on the project, 1062? A. I did.

Q. Now, state whether or not it is possible for that hoe to make a vertical cut or bank on that portion of the excavation adjacent to the hoe itself?

Mr. Holman: Just a minute; objected for the reason the witness is not shown qualified.

The Court: Overruled.

A. It is possible.

Q. And would you explain the operation of the hoe in that regard?

A. Might I explain the operation there of excavating that hole?

Q. Well, do that, please.

(Testimony of M. C. Schaefer.)

A. All right. The shovel in reaching out to the far side of the structure dug its teeth in at the approximate line of the stakes which were staked out a foot outside of the neat concrete lines, and pulling dirt toward itself, would pick up and deposit to either side of the structure hole. In getting down into the hole deeper, and the bank next to the shovel, it dug a vertical hole. The hole on the far side from the shovel was not vertical, it was sloped, but the slope was on the inside of the hole lines which would be dug out by hand later.

Q. And after the slope on the inside of the hole lines, as you say, did you see the hole lines later?

A. The hole lines? Yes.

Q. After that slope was excavated out what kind of an excavation did that leave then?

A. That left vertical bank all the way around.

Mr. Holman: Just a minute, please; hoe or hole?

A. Hole.

Q. And did you actually observe the hoe operating?

A. I did; I observed that hoe operating half a dozen different locations.

Q. Is that what you saw there, or not?

A. Yes.

Q. Now, with reference to the Mixomobile operation, it's been stated that that required more men than the transit mixer. Would you state what is the fact in that regard?

A. The fact is it would require at lease one more man to do a comparable job with a transit mixer.

(Testimony of M. C. Schaefer.)

Q. Than what?

A. Than to use a Mixomobile.

Q. And why is that? Just explain it.

A. Because the difference would be that you'd require four transit mixers to the Mixer operator and two dump trucks.

The Court: It's time to adjourn now; we'll take an adjournment until 9:30 tomorrow morning.

(Whereupon the Court took a recess in this cause until Thursday, March 20, 1947, at 9:30 o'clock, a.m.)

Yakima, Washington, March 20, 1947

9:30 A.M.

(All parties present as before, and the trial was resumed.) [2340]

M. C. SCHAEFER

the plaintiff, resumed the witness stand for further testimony in rebuttal, as follows:

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, at adjournment last evening we were just starting to take up the operations of the Mixomobile as compared with the use of transit mixers for the same purpose. Now, I think you al-



(Testimony of M. C. Schaefer.)

ready testified that your Mixomobile operations would not take more men than the transit mixers, and I had just asked you to explain and compare the pouring of cement in structures of this type by the Mixomobile operations as compared with the transit operations, with special reference to the use of manpower.

A. The manpower required with the Mixomobile and the manpower required with the transit mixers, aside of the Mixomobile operator, dump truck drivers, and the drivers on the transit mixers, the rest of the men would be about the same requirement in either operation, but the use of the Mixomobile, you'd operate two dump trucks, hauling three batches, each equivalent to three yards of concrete, each, and they would have loads, there would probably be a load or two at the job site ready to start first thing in the morning, whereas with the transit mixer they'd have to pick up their load at the batching plant the first thing in the morning, and with the Mixomobile the first truck up would dump a batch of aggregate, or the [2341] materials for a batch of concrete, into the hopper, and the hopper deposit it into the mixer, you could dump the second batch into the hopper; that would go into the mixer, and they'd dump their third batch into the hopper and immediately leave for another load.

That's not true with the pre-mix truck. The pre-mix truck has to stay there until every bit of material is deposited in the form, so therefore there is a faster operation. A truck hauling three batches

(Testimony of M. C. Schaefer.)

of concrete materials to the job is not as heavy as a transit mixer, and it will get to the mixer and make a round trip in less time, so it will require four pre-mix trucks to two batch trucks to supply the same amount of concrete.

Q. How about the relative cost of equipment required in the two operations?

A. The cost of the equipment, your mixers, your transit mixers, cost about \$9,000.00 apiece, or \$36,000.00. Your Mixomobile costs \$7,000.00, the two trucks cost about \$5,000.00 for the two of them, then we had a buggymobile on the job for getting to structures that were inaccessible to the mixer for depositing right out of the chute, and which would have involved a whole lot of work on the part of—I'd say, had we used pre-mix trucks; that cost about \$1,500.00. Then we had a water wagon, and that cost about \$2,500.00, so you would have \$16,000.00 as compared [2342] with \$36,000.00 of equipment, and as to the weight of the mixer, your Mixomobile would travel and weigh about 8 ton, where your transit mixers would weigh about 12 ton, and as to maneuverability on the job, your Mixomobile is more mobile on the job than a transit mixer. The Mixomobile is about as mobile on the job as a loaded dump truck. You just pull up to it, back into the location, just as you would with a dump truck.

Q. All right; now, Mr. Schaefer, Mr. Hance seemed to recommend the use of a two-sack mixer as preferable on this type of work——

A. It is not a good mixer to use.

(Testimony of M. C. Schaefer.)

Q. Just a minute.

The Court: Wait until he asks the question.

Q. I will ask you first, do you own such equipment?  
A. I do.

Q. And did you own such equipment at the time that you took this contract?  
A. I did.

Q. And was that equipment available to put on this work?  
A. It would have been, yes.

Q. What piece of equipment did you have?

A. It's a half-yard Jaeger mixer.

Q. Is that the type of mixer that Mr. Hance has described?  
A. That's right, it is. [2343]

Q. Did you have that available at the time you went out and bought this Mixomobile?

A. I did.

Q. And the Buggymobile?  
A. Yes.

Q. Now, why didn't you use that Jaeger mixer on the job, and explain whether or not it is applicable for use on this job.

A. It is not applicable; while we had, and there aren't many two-sack mixers, as they're called, that have batch, that is, skips for a dump truck to batch it, our mixer does have, that is, the two-sack mixer is so equipped, but in that connection we would perhaps haul a yard and a half of material instead of hauling three yards of material in the same truck, which would duplicate our cost of hauling aggregate; it is not—I don't believe that it would be at all permissible to locate your sand and gravel out on the job in the first place, because you would accumulate dust and you'd get dirty aggregate, de-

(Testimony of M. C. Schaefer.)

positing it on the ground as it would be there, and the top soil, you'd have considerable of the aggregate dusting up in your top soil; there'd be a loss of aggregate, therefore. You'd haul your cement out to the location at the job; it would involve more labor; it would practically double your labor of placing your concrete and weigh batching, to shovel the aggregate, it takes more man power again, shoveling that aggregate into the wheel barrow, wheel it on to this here moveable scale, weighing it, and dumping it into this skip. That's not required when you haul the aggregate out, batching. Our cement is carried in containers that are hinged to the end gate of the truck. You just tip one of these containers over into the skip, you pull the lever and dump your batch of aggregate into the skip, that is, you dump your aggregate and you dump your cement on it, and you just draw it into the mixer. The other way you'd come out, you'd be hauling your aggregate, about the same quantity per load, out to the job site, you'd have the same trucking, practically the same trucking, and you'd have all this additional weighing.

Q. Now, how is this two-sack mixer propelled or moved from one location to another?

A. It takes two good men, or three, to raise the tongue and connect it to a dump truck.

Q. It's not self-propelled?

A. It's not self-propelled, and then to tow that piece of equipment back of a dump truck, it isn't like towing it out on a highway.



(Testimony of M. C. Schaefer.)

Q. How many wheels are on a two-sack mixer?

A. Two wheels. [2345]

Q. By the way, Mr. Schaefer, how long do you mix the aggregate in the mixer before it can be poured?

A. Well, in this case here, why, we probably mixed it longer. The requirement on a two-yard mixer is two minutes.

Q. Two minutes?           A. That's right.

Q. Now, Mr. Schaefer, did you have a conversation with Mr. Verne Ashley at his office in Coeur d'Alene, Idaho, on or about October 26, 1944?

A. I did.

Q. And who was present?

A. There was Verne Ashley, Pat Darcy, Verne Ashley's son, young son, and he was there for a short time, and myself.

Q. And did you discuss 1062 at that time?

A. We did.

Q. Would you state the nature of that conversation?

Mr. Holman: Just a minute, your Honor, I object to that unless the witness's attention is directed to the statements of Mr. Ashley which counsel interrogated Mr. Ashley on. In other words, now he's asking him to state the nature of the conversation. I submit that's not proper rebuttal.

Mr. Olson: I'll direct his attention. I understood counsel objected to that yesterday.

Mr. Holman: Counsel has not misunderstood me, [2346] your Honor. Where there is a time,

(Testimony of M. C. Schaefer.)

place and person fixed, then the substance of the conversation is a proper matter of inquiry.

The Court: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, at that time did Mr. Ashley state in substance or effect that running the 1062 for Mr. Schaefer was a two man job?

A. For Mr. Macri?

Q. Yes, for Mr. Macri, was a two man job?

A. He did.

Q. Can you relate in substance the statement made by Mr. Ashley in that regard?

Mr. Holman: Just a minute. Your Honor, I object to the witness using notes on this. This is a test of memory.

The Court: Well, I think he should state his best recollection on it, yes.

Witness: Mr. Ashley said that that job was a two man job, and that he had asked Mr. Staples to stay on. Mr. Staples said——

Mr. Holman: Just a minute. Your Honor, I submit that is not binding on Mr. Macri, as this is at the end of the job, and this witness and Mr. Ashley purport to give a conversation between Ashley and Staples [2347]

The Court: As I understand, this is in the nature of impeachment of Mr. Ashley. He stated he didn't make these statements. Is that the purpose of it?

Mr. Olson: Yes.

(Testimony of M. C. Schaefer.)

Mr. Holman: Well, then, I withdraw my objection, your Honor.

Witness continuing: ——and Mr. Staples said “Well, that’s all right with me if you can fix it up that way with Mr. Macri,” then Staples did stay on there for a short time, and Macri——

Mr. Holman: I submit, your Honor, that that is not conversation the witness now is testifying.

Q. Did Mr. Ashley say that?                   A. Yes.

Mr. Holman: Pardon me.

Witness continuing: ——and then Ashley said that Macri called him when the payroll went in, and asked him why Staples was on the job, and Mr. Ashley said “I still need Staples till I learn more about the job” and Mr. Macri said “Well, you better learn fast; Staples has got to get off the job.”

Q. Now, Mr. Schaefer, the notes which you had in your hand, when were they made?

A. They were made right after we left Ashley’s office, and within two blocks of the office. [2348]

The Court: You mean at the time of the conversation, or shortly after?

A. The time of the conversation.

The Court: I think if that’s the case you may use your notes to refresh your memory.

Mr. Olson: I don’t think the witness really needs them, your Honor.

The Court: Well, it’s proper to use them if they are made on or about the time.

(Testimony of M. C. Schaefer.)

Mr. Olson: In view of the remark that went into the record I wanted to explain that.

The Court: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, at that same conversation in Coeur d'Alene with Mr. Ashley, on that date, did Mr. Ashley say in substance or effect, in reply to a question asked by Mr. Darcy, that his blow up with Mr. Macri resulted from there not being sufficient lumber, no effort on the part of Mr. Macri to get lumber, not sufficient manpower, and Macri's refusal to pay wages sufficient to get manpower, and lack of sufficient equipment, and Macri's refusal to furnish additional equipment?

Mr. Hawkins: Your Honor, I object to that question because, as I recall Mr. Ashley's testimony his answer to that question was merely that there was no [2349] blow up between him and Mr. Macri.

The Court: It is my recollection that he denied, in effect, making the statement. I'll overrule the objection.

Witness: Pat Darcy asked Mr. Ashley——

Q. Was there such a conversation?

A. Yes.

Q. Would you state what Mr. Darcy said to Mr. Ashley and Mr. Ashley's reply, with reference to the subject matter of my previous question?



(Testimony of M. C. Schaefer.)

A. Mr. Darcy asked Mr. Ashley "What led up to your blow-up with Macri?" and then Mr. Ashley said "Well, my blow-up came because Macri refused to pay enough for help, and the labor is not competent to lay out structures." He said "That takes another man; that's why Staples and I should have been permitted to stay on that job."

Mr. Holman: Now, your Honor, in view of the witness' present statement I move his answer to the last question be stricken as inconsistent.

The Court: In what way?

Mr. Holman: Well, lumber and insufficient men as the reasons. Now he's given a different reason.

The Court: Well, I'll deny the motion to strike. I think it goes to weight rather than competency.

Q. Had you finished the conversation? [2350]

A. No, I did not. That he didn't have enough good help——

Mr. Hawkins: Your Honor, I call your attention to the fact that the witness is reading from his notes.

The Court: Just refresh your memory.

Witness: I'll lay them away.

Mr. Hawkins: He's looking at them all the time. I don't know whether he's reading or not; he gives every evidence of it.

Q. Give it from memory.

A. He said that because of not having lumber, refusal to send lumber in when required, because of the equipment, they didn't have equipment to get men around from structure to structure for the fine

(Testimony of M. C. Schaefer.)

grading, if they did have the men. Macri refused to supply additional equipment or men or lumber.

Q. Now, Mr. Schaefer, Mr. Hance testified that the entire excavations, or the entire cubic yardage of structure excavation as shown by the final estimate, these structures could be excavated by hand at a total cost of \$11,250.00. State whether or not that is so.

A. It could not be done for that.

Q. Could it have been done for that price in 1944?

A. It could not.

Q. Would you explain what, in your opinion, it would cost to hand excavate those structures, I mean entirely by [2351] hand?

A. Hand excavating those structures, to lay them out, to do the fine grading, and the excavating, would take not less than  $3\frac{1}{2}$  man hours per cubic yard.

Q. And what rate of pay would it cost per man hour for that type of work in 1944?

A. I wouldn't be able to say just what the rate was right then; I think it was a dollar an hour, but you'd have the insurance and taxes, too, labor tax. If the total was a dollar, it would be \$3.50 a yard.

Q. Well, now, Mr. Schaefer, in giving that number of man hours per cubic yard, what type of soil digging are you taking into consideration?

A. I'm taking into consideration the soil right out on that project, and the conditions as I saw them.

(Testimony of M. C. Schaefer.)

Q. What with reference to the soil being frozen?

A. No, this here would be on a basis of no frost.

Q. Now, do you recall getting a notice from Mr. Macri to proceed with 1068? A. Yes.

Q. And also the notice of January 3, I believe, 1945, declaring that you were in default?

A. I did.

Q. Now, during that intervening period did the Concrete Construction Company have forms available to use in the [2352] performance of 1068, if structure excavations had been available?

Mr. Holman: Just a minute. Your Honor, I object to that question as not being proper rebuttal. This witness went into the whole thing in his case in chief.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: I think it was covered in his direct.

Mr. Olson: Your Honor, my purpose in it is defensive to their cross-complaint. We did put in testimony that showed that the hand excavation—that there were no excavations ready until February 5, and that prior to that time that Macri and Company had taken over the building of forms, but there has been an inference in Mr. Macri's case, an inference only, that we should have started the form making before the excavations were ready, and it's to meet that that I offer to show this.

The Court: Mr. Holman?

(Testimony of M. C. Schaefer.)

Mr. Holman: Well, of course, I don't want to deprive them of proper rebuttal, your Honor, but the mere reiteration of the case in chief I think is improper. It was part of their case in chief, your Honor, because they are suing for \$5,000.00 for breach of this contract, and they made their proof, and we met it, and [2353] this gentleman himself testified, he even testified the dates he was on there.

The Court: You have two sides of this. You have your cross-complaint for your damages for Schaefer's breach of this contract, and you were going forward in direct, really, when you made your case on that phase of it, and it seems to be undisputed that there wasn't any excavations ready for pouring of concrete at the time that Macri gave notice of cancellation of that contract, so that if Schaefer breached, it would be by way of failure to make preliminary preparations.

Mr. Olson: Will you read the question?

(Whereupon, the reporter read the last previous question.)

Witness: Yes, we did.

Q. And those were from what source, Mr. Schaefer?

A. They were from the job 1062.

Q. Now, there's been certain checks, I guess what is in evidence now is the carbon copies of the checks, and the vouchers, indicating payment to the Concrete Construction Company, Mr. Schaefer, par-



(Testimony of M. C. Schaefer.)

ticularly Macri's Exhibit 99. I'll ask you why those checks were cashed if you had an agreement with Mr. Macri to pay you your actual costs?

Mr. Holman: That I submit, your Honor, is not a proper question. It's based on an assumption. He's [2354] asking this witness now why he did something in view of the fact that he claimed he had an agreement——

The Court: I'll overrule the objection. He can explain.

Witness: These here were based on the engineer's estimate, and we could not submit a bill for our additional costs until the end of the job.

Mr. Olson: These are not all of the payments, are they, Mr. Holman? You didn't put in the copies of the checks that had no vouchers on them?

Mr. Holman: These are all the checks that had vouchers.

Mr. Olson: You didn't put in the copies of the checks that had no vouchers?

Mr. Holman: No, I didn't have vouchers every time. There were separate checks sent with those; you cashed the checks. Mr. Olson, and your Honor, with respect to these payments, Mr. Hendershott had given all the payments, and I understood that would not become an issue here, and therefore I did not make complete proof on that.

Mr. Olson: Do you have the checks issued subsequent to the checks shown in Exhibit 99, which do not have vouchers attached to them?

(Testimony of M. C. Schaefer.)

Mr. Holman: I had them, brought them, and submitted [2355] them to you, and I'll have to look them up again now. You requested them, and I brought them over.

Mr. Olson: You say you submitted them to me? Well, Mr. Schaefer, were all of the payments made to you by the Macri and Company voucher form checks of the type shown on Macri's Exhibit 99?

Witness: No.

Mr. Olson: You don't have those copies of those checks with you in court now, Mr. Holman?

Mr. Holman: Mr. Olson, I don't know. I'll just have to look. I had them and delivered them to you.

The Court: As I understand it, this has been said many times here, but the amount of payments has been settled by the pre-trial conference, and it is also undisputed, is it not, that payments were made in two instances without a voucher attached?

Mr. Holman: Yes, your Honor, because they ran out of those checks.

The Court: Was there anything you wanted particularly?

Mr. Olson: Simply that the two checks are in considerable, sizable amount, and they are the last payments that were made to the Concerte Construction Company.

The Court: Without the attached vouchers?

Mr. Olson: Without the attached vouchers.

The Court: Can you stipulate as to the approximate amount of the checks?

(Testimony of M. C. Schaefer.)

Mr. Holman: We have Mr. Hendershott's compilation, your Honor. By checking those off it will give the other checks, that's all.

The Court: If you wanted to show the date and amount, that would be all that is material from your standpoint, Mr. Olson?

Mr. Olson: Yes.

The Court: I wonder if we couldn't stipulate to that?

Mr. Olson: There was one check in the amount of \$2985.46, issued in March, 1945, I do not have the exact day in March, and the second check is for \$7050.50, issued in April, 1945, neither of which were voucher checks.

Mr. Holman: Now, if I could have just a second with counsel here, your Honor, it will save a lot of time.

The Court: All right.

Mr. Holman: I found what counsel says is correct, and I so stipulate, your Honor, that those checks were sent with vouchers attached, but not part of the check.

Mr. Olson: They were what, you say?

Mr. Holman: They were just a check with the statement attached, that's our testimony.

The Court: I don't know whether counsel is willing to stipulate as to the statement attached, but you will stipulate there was no voucher form attached to the check?

Mr. Holman: I stipulate there was a separate voucher form attached to the checks, and I call on counsel to produce those checks.

(Testimony of M. C. Schaefer.)

The Court: Well, perhaps you had better produce the checks, then, if you can't get together on it.

Mr. Olson: Your Honor, that's all of my questioning, with that exception.

The Court: All right.

Mr. Holman: Your Honor, it's going to take some time to find those checks themselves.

The Court: All right; can you proceed with the cross-examination in the meantime?

Mr. Holman: I would like to have marked for identification the following communications: A letter and registered envelope from the Concrete Construction Company to Macri and Company dated December 5, 1944, and I'll ask the clerk to remove the pencil notations from that. That's a letter from the Concrete Construction Company to Mr. Macri.

(Whereupon, Letter Schaefer to [2358] Macri dated December 5, 1944, was marked Defendant Macri's Exhibit No. 124 for identification.)

Mr. Holman: I call for the production of the original of letter of January 25, 1945, to the Concrete Construction Company from H. T. Nelson, Construction Engineer, showing copy to Macri and Company.

Mr. Olson: I think it's in evidence as an exhibit.

The Clerk: It is Exhibit 37.

Mr. Olson: And that's our original that we produced.



(Testimony of M. C. Schaefer.)

Mr. Holman: I call for the original of letter of January 27, 1945, to Concrete Construction Company from Macri and Company.

The Clerk: That's in evidence as Macri's Exhibit 38.

Mr. Holman: I call for the original of the letter of July 23, 1945, to the Concrete Construction Company from Macri and Company.

Mr. Olson: May I see the copy?

Mr. Holman: You referred to it during the trial.

The Court: Isn't that the one that Mr. Schaefer testified he never received?

Mr. Holman: No, the one in September. [2359]

The Court: That's the one Mr. Schaefer testified he never received, so you may make your demand, all right, but he testified he didn't get it.

Mr. Holman: I thought he said September; that's July.

Mr. Olson: Well, the one you put in evidence sent a corrected statement, and then I asked him if he had received any other statement of which that one might have been a correction, and he said he did not.

The Court: The heading reads the same as the other one. I remember the other was not a carbon copy, but a typed copy.

Mr. Holman: There was a carbon copy substituted later, but the heading of the September letter read "corrected."

The Court: What is your statement to his demand for the original of that?

(Testimony of M. C. Schaefer.)

Mr. Olson: We do not have it, as Mr. Schaefer testified he never received either one of them.

The Court: All right.

Mr. Holman: I would like to have marked the letter of August 3, to myself from W. R. McKelvey, and the copy of letter of July 31 referred to therein.

The Court: Do you want them marked together, or separately? [2360]

Mr. Holman: They should be one.

(Whereupon, Letter Schaefer to Macri dated July 31, 1945, was marked Defendant Macri's Exhibit No. 125 for identification, and letter McKelvey to Holman dated August 3, 1945, was marked Defendant Macri's Exhibit No. 125a for identification.)

Mr. Holman: I would like to have the original of letter to W. R. McKelvey from our firm of March 14, 1945.

The Court: Is that a letter written to Mr. McKelvey?

Mr. Olson: Yes; I don't have the original.

The Court: Do you have Mr. McKelvey's file?

Mr. Olson: No, I do not.

Mr. Holman: There's other correspondence, your Honor, but it pertains to the payment of these claims covered by the second set of vouchers, and I don't think that's sufficiently established.

The Court: You mean the two checks that had no vouchers attached?

(Testimony of M. C. Schaefer.)

Mr. Holman: No, pertains to these payments, this second set of check vouchers that were for payment of claims against Mr. Schaefer, exhibit 100.

The Court: Yes, I remember that.

(Whereupon, copy of letter Holman to McKelvey dated March 14, 1945, was marked Defendant [2361] Macri's Exhibit No. 126 for identification.)

### Cross-Examination

By Mr. Holman:

Q. Handing you what has been marked Macri's 124 for identification, is that your signature, and did you send that letter by registered mail as shown by the envelope attached; look at the envelope, please, to Macri and Company? A. I did.

Mr. Holman: This is offered in evidence, your Honor.

Mr. Olson: Your Honor, we object to it as being irrelevant, incompetent and immaterial, and does not serve any issue in this case, and is not proper cross-examination of rebuttal testimony of Mr. Schaefer. It is a letter relating to the appointment of an arbitrator. Arbitration is out of the case by pre-trial order.

Mr. Holman: The matter of arbitration is out, that's true, but this is the forerunner of the conversation this witness detailed on rebuttal, in my office, with respect to that, and shows the relation-

(Testimony of M. C. Schaefer.)

ship between the parties as of that day, and whether or not they were standing on the sub-contract or waiving it.

Mr. Olson: It is not proper cross-examination in rebuttal. [2362]

The Court: It seems to me that is material, but I don't think it is proper cross-examination. This witness didn't go into the matter of arbitration.

Mr. Holman: No, your Honor, but I submit that it is material in view of the witness' statements.

The Court: What statements?

Mr. Holman: On rebuttal testimony as to the meeting in my office.

The Court: Well, this has nothing to do with the meeting in your office.

Mr. Holman: It preceded it, and fixed the relationship of the parties.

The Court: I don't remember he testified anything about arbitration in your office, or any conversation about arbitration.

Mr. Holman: No, sir.

The Court: He said there was some meeting up there in an effort to settle. Well, I think it would be material as your surrebuttal anyway, so I don't think the order in which it goes in is material. I'll overrule the objection, and admit it.

(Whereupon, Defendant Macri's Exhibit No. 124 for identification was admitted in evidence.)



(Testimony of M. C. Schaefer.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, handing you what has been marked identification [2363] 125a, a communication of August 3, 1945, addressed to me and sent by Mr. McKelvey, and referring to a letter of July 31 from the Concrete Construction Company, and referring then to Macri's 125, a carbon of that letter, can you tell me whether or not you did send the original of 125?           A. Yes.

Mr. Holman: I offer that in evidence, your Honor.

The Court: Will you offer both of those?

Mr. Holman: Well, the way they're attached here, your Honor, 125a is the transmittal letter to me from Mr. McKelvey, and 125 itself is the copy of the letter he admits, the witness, himself, has said he sent it.

Witness: I don't say that I received a copy of that from Mr. McKelvey.

Mr. Holman: That isn't what I asked you. I asked if you sent that to Mr. McKelvey to transmit to me.

Witness: Yes.

Mr. Holman: May I proceed, your Honor?

The Court: Well, wait for counsel. I think you've offered this, haven't you. Mr. Olson, do you have an objection to the offer of identification 125?

(Testimony of M. C. Schaefer.)

Mr. Olson: I've got no particular objection, your Honor. The whole contents of it are admitted, that those payments were made and credited.

The Court: Well, it seems to me that it is probably immaterial, but if you have no objection to it I'll let it in. There's no question but what Mr. Schaefer authorized the payment of these sums, is there?

Mr. Holman: No, there's no question about that, but there is a question as to when Mr. Schaefer claimed for the first time that the contract had been broken.

The Court: As I understood it, the vouchers were admitted here for the purpose of showing, or tending to show, that the parties were continuing to deal under the sub-contract. Now, this order of payment is equally consistent with the existence or continued existence of the sub-contract, and with the existence of the oral contract. It is as consistent with one as with the other, but it doesn't seem to me it has any evidentiary value. Do you want it in?

Mr. Olson: I just don't care a bit. I think it doesn't add a thing except another numbered exhibit.

The Court: Well, it will be admitted.

(Whereupon, Defendant Maeri's Exhibits Nos. 125 and 125a for identification were admitted in evidence.)

(Testimony of M. C. Schaefer.)

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Mr. Schaefer, I am calling your attention to identification [2365] 126, a communication to Mr. McKelvey at Seattle from me, of March 14, and directing your attention particularly to the last paragraph of the first page of that, I'll ask you if Mr. McKelvey communicated the contents of that letter, and particularly that paragraph, to you? In the first place, did he send you a copy of the letter, Mr. Schaefer?

A. I couldn't say that until after I read it.

Q. Very well, sir.

A. I wouldn't say that I received that letter. If I did it's in my file. There was some conversation with Mr. McKelvey, I had conversation with Mr. McKelvey about it.

Mr. Holman: I offer this in evidence, your Honor.

Mr. Olson: Your Honor——

The Court: I don't believe that's a proper foundation for the introduction of the document.

Mr. Holman: Will you look in yor file and see if you have a copy of that document?

Mr. Olson: I do have a copy.

Mr. Holman: May I have the copy?

Mr. Olson: I don't know that it is necessary. It is undoubtedly like yours.

(Testimony of M. C. Schaefer.)

The Court: Well, let's see it.

Mr. Holman: Mr. Schaefer said in his file. Are you referring to Mr. Schaefer's file? [2366]

Mr. Olson: I'm referring to Harry L. Olson's file. Your Honor, that letter was one Mr. Holman wrote with considerable foresight, undoubtedly written for just the purpose of introducing it into evidence. At least it reads that way to me. It is a very polished and well-written letter, and Mr. Holman is to be complimented on his choice of language, but I do object to the letter going into evidence in this case as any evidence against anybody. It is purely self-serving, everything in it.

Mr. Holman: All that counsel says is correct except the beauty of the letter. It is a self-serving document, necessarily, but it is a part of the same correspondence, and states and binds Mr. Macri as to position.

The Court: It seems to me that we've gone far enough afield in going into the details of this attempted settlement and arbitration. After all, it has only value to show whether or not the parties were still dealing with reference to the sub-contract. It seems to me it is too far afield to have a copy of a letter from Mr. Macri's attorney to Mr. Schaefer's attorney, and I'll sustain the objection.

(Whereupon, Defendant Macri's Exhibit No. 126 for identification was rejected.)



(Testimony of M. C. Schaefer.)

Cross-Examination  
(Continued)

By Mr. Holman: [2367]

Q. Mr. Schaefer, did you at any time prior to June 14, 1944, have any telephone conversation with Mr. Macri other than the one you've indicated on your exhibit, your telephone slip?

A. Prior to June by telephone?

Q. Prior to June 14, sir.

A. I've had conversation with Mr. Macri.

Q. Yes, you did have conversation with Mr. Macri prior to June 14, did you not?

A. By 'phone, yes.

Q. And do you have your slips to show that you made all those calls, or not?

A. Well, there are some of the slips that I do not have. I believe I have the majority of my 'phone slips.

Q. Now, is it or is it not a fact that Mr. Macri never called you?

A. That Macri never called me?

Q. Is that a fact, or is it not a fact?

A. I would say if Mr. Macri called me, he called me after I had called him, or returned my call.

Q. Might it be that you called Macri and didn't get him and left your number for him to call?

A. I've done that.

Q. That's happened, has it not, sir?

A. And I wouldn't swear that he called me back on any of [2368] those calls, either, because it was

(Testimony of M. C. Schaefer.)

generally the case where I've called two or three places, and then perhaps called him again the next day or two days later. That was more apt the case than that he returned my call.

Q. Well, you still wouldn't swear one way or the other?

A. I still wouldn't swear that Macri has ever called me.

Q. Or you wouldn't swear that he has not called you?

A. No, I wouldn't.

Q. All right, sir. With respect to your Mixmobile, Mr. Schaefer, were not present when your brother testified, or maybe you testified, that when the tower was taken off, that you had made two chutes of 30 feet in length, and there's a bill item for it in your statement, correct?

A. Two chutes of 30 feet?

Q. Yes.

A. I don't believe our chutes are 30 feet long.

Q. Well, anyway, metal chutes?

A. I don't believe those chutes are 30 feet long.

Q. Well, let's put it this way, a total of 30 feet of chutes, in metal?

A. Yes, we have two chutes.

Q. Now, if the Mixomobile could be backed right up to the form, why did you need those chutes?

A. Well, the first type of chute used was a brake type of [2369] chute.

Q. Talking about the tower, now?

A. Well, I believe that was one that was used right after we removed the tower.

Q. All right.

(Testimony of M. C. Schaefer.)

A. I wouldn't say that we didn't use it with the tower, either.

Q. Well, will you answer my question? Why, if you could back right up to dump concrete into a form direct from the Mixomobile, did you need a chute that long?

A. How long are you stating now that that chute is, 30 feet? I don't believe it was 30 feet long.

Q. No, I understood you had two of them, and I thought 30 feet for the two of them I think was the answer.

A. Well, it may be that the two of them if they were butted end to end would have made 30 feet, but the first chute was a broken type chute; it wasn't as adjustable as the chute we later used.

Q. Now, the first type chute was the one you used with the tower, right?

A. I believe we used that with the tower.

Q. Yes, sir. May I have 49? And the picture, 49-1, shows the chute attached and using the tower, does it not?

A. That's right.

Q. In which you elevated the material up the ladder, or up [2370] the tower, and then dropped it rather straight, quite an acute angle, down into the form, correct?

A. That's right.

Q. Now then, will you turn to 49-35 and 49-36? Those are operations by the chute after the tower had been removed?

A. That's right.

Q. And these chutes which are shown there are the chutes about which I interrogated you?

A. I believe we have a picture in here where the chute would show a little more prominently.

(Testimony of M. C. Schaefer.)

Q. Well, would you answer me whether or not you can recognize those chutes?

A. That's a chute, yes.

Q. Can you tell me whether or not those are the chutes you testified about, or at least were in the compilations here as a cost item, of making those chutes?

A. I don't know that that's in the statement.

Mr. Olson: I object to cross-examination on that phase. It is not proper cross-examination in the rebuttal. There's no testimony that the cost of those chutes were included in the compilation in the first place.

Mr. Holman: Mr. Hendershott identified them.

Mr. Olson: No, he didn't.

The Court: I think it is proper to question him [2371] about the use of the chutes as it pertains to efficiency of the Mixomobile, but he didn't testify this time as to cost.

Mr. Holman: No, I didn't intend to go into cost.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, in 49-35 and 36, the fact is, is it not, that the Mixomobile instead of being right up at the form to pour is off at considerable distance, four or five feet?

A. It's more than that.

Q. And that is for the purpose of preventing the weight from caving down the excavation, is it not?



(Testimony of M. C. Schaefer.)

A. That isn't necessary; in other words, the use of the chute there, the length of the chute, would sort of determine the nearness or proximity of the mixer to the form.

Q. When you told counsel on direct that the Mix-mobile could be brought right up and poured directly into the chute——

A. ——Into the forms.

Q. ——you meant, did you not, that it could be poured into a chute at a sufficient distance to accommodate the weight of the Mixomobile?

A. I meant that there was no intervening method, as wheel-barrowing, or any other method, to take it from the mixer into the form.

Q. Then you were not talking about distance, you were talking [2372] about operation?

A. That's right.

Q. I see. Now, you, I believe, told counsel that a pre-mix truck, or a revolving transit mixer truck would have to remain until all of the concrete in the cylinder had been deposited in the form, correct?

A. Either into the form or into an intervening method of depositing it into the form.

Q. Don't you know as a fact, sir, from your general experience in construction, that the transit mixer is used for the purpose of dispensing anything from a bucket full to a wheelbarrow full to a cubic yard and go right on and deliver the rest to the next job?

A. Oh, most certainly, but the thing I meant was before it returned for another batch.

(Testimony of M. C. Schaefer.)

Q. Now then, Mr. Schaefer would it be possible for the transit mixer to place the concrete in one form and then place the remainder of the quantity in the next form?

A. That's correct. I've poured thousands of yards of concrete with pre-mix trucks.

Q. I just didn't want to mis-understand you on that, sir. Now, is it or is it not a fact that the mixer unit itself has a basic cost independently of the truck?

A. You can buy 'most any part of any piece of equipment.

Q. That's not what I asked. Has the mixer unit itself, [2373] independently of the truck, a basic cost?      A. Yes.

Q. And in answering counsel as to the cost of the Mixomobile, what type of truck did you figure?

A. Well, that's the price that I considered there was, what information I have as to the cost of ready-mix trucks, or pre-mix trucks.

Q. Well, what weight, what size, what make?

A. Two yards.

Q. Well, the trucks are not rated by yards, they're rated by tonnage, are they not?

A. No, they're rated by yards, two, three, five.

Q. Among standard makes, what would be the name of some of those trucks?

A. Some of them would be Ford, there's been Mack trucks used, Whites, a number of others.

Q. The heavier, the more durable and the more powerful the truck the higher the price, isn't that right?      A. That's right.

(Testimony of M. C. Schaefer.)

Q. And then by putting the mixer unit on top, the higher the over-all cost? A. That's right.

Q. So when you were answering counsel, what truck did you have in mind?

A. I didn't have any particular truck in mind.

Q. All right, sir. Now, you said, did you not, that you owned a Jaeger mixer at that time?

A. That's correct.

Q. And you had it available? A. I did.

Q. And did you have it available in April, 1944?

A. Yes.

Q. Did you have it available at the time you obtained 665 sacks of cement from the government?

A. Yes.

Q. Did you bring it here to use this 665 sacks of cement?

A. I did not bring that mixer up to this job.

Q. It is mobile, is it not, so it could be driven to this job? A. No, it is towed.

Q. Or is it towed?

A. It is towed by truck.

Q. You had trucks available so it could be towed to place concrete at that time, did you not?

A. That's right.

Q. And you did not use that 665 sacks of concrete at that time, did you, sir, in April.

A. In April? No.

Q. And you did not use it until July 31?

A. We didn't use this mixer on that job at all.

Q. I'm talking about that 665 sacks of cement.

A. No.

(Testimony of M. C. Schaefer.)

Q. How does that compare with a carload of cement, Mr. Schaefer?

Mr. Olson: Now, if the Court please, that's not proper cross-examination.

The Court: Sustain the objection.

Q. You spoke of dust accumulating on stock piles if they were placed out in the field. Did you contemplate complete stocking for the aggregates for the job at one spot? A. No.

Q. Or did you contemplate the aggregates for a reasonably accessible number of forms in which the concrete was to be placed?

A. The placing—in other words, I'd never given a thing like that any thought at all, only as to analysis here, or what somebody else has made his statement.

Q. That's right, I understand that you never did that. A. No, I didn't.

Q. So when you answered counsel about the dust, how large a stockpile were you contemplating?

A. Well, the stock pile necessary for each cluster of structures.

Q. And what would be the dimensions in a stock pile of that size? [2376]

A. The dimension of a stock pile like that would—

Q. Let's take the ordinary box structure.

A. Oh, say, you'd have material scattered there in a radius of 20 feet before you got through with it.

Q. How high?

A. I'm saying as to what it would be scattered to before you got your pour made.



(Testimony of M. C. Schaefer.)

Q. We're talking about a stock pile now. How large a stock pile would you have? Did you contemplate that up here when you were talking?

A. No, I didn't give that any thought.

Q. How large a stock pile would you have?

A. You'd have a pile there that would probably be four feet high.

Q. And what circumference, or diameter?

A. And it would be the pyramid type, and on a two-structure, you'd probably have about four, I'd say five yards, you'd probably have five yards of aggregate; there'd be somewhere you'd have a greater pile of that——

Q. Approximately what would the diameter be of that hill of aggregates?

A. Oh, a diameter of 10 feet.

Q. Now, tarpaulins are used, are they not, for covering in construction practice?

A. Do you mean you'd stick a tarpaulin over all those different [2377] piles of aggregate out there?

Q. You wouldn't do it?

A. I wouldn't even think about it.

Q. Now, you spoke of the dust. There was dust there, was there not?

A. There was.

Q. And that had a direct effect upon the operation of machinery, did it not?

A. Sure it did.

Q. The same dust?

A. Yes.

Q. And that's all machinery, whether it's yours or Macri's?

A. That's right.

Q. There was a direct dust application all the time?

(Testimony of M. C. Schaefer.)

Mr. Olson: That's not proper cross-examination.

The Court: Sustained. That's leading right out into the woods from something that was material.

Q. Now, your cost for excavating the entire of structures by hand is 31½ man hours per cubic yard of excavated quantities?

A. That's correct.

The Court: Well, we'll recess now for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.) [2378]

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Schaefer, I believe you told counsel that you had forms available if structures had been available on 1068, and you answered him you had the forms on job 1062. Had you made any purchase from Mr. Macri on those forms?

A. I did not.

Q. Is it not a fact that your sub-contract on 1062 provided as one of your duties that you would neatly pile the forms, and that the lumber was to become the property of Mr. Macri?

A. That's right, but I want to carry on from there a little bit, that isn't all.

The Court: Well, you've answered the question. Your counsel can qualify it.

(Testimony of M. C. Schaefer.)

Q. Now, do you have something else to say, sir?

A. On that?

Q. On that, yes.           A. The——

Q. I say, do you have something else to say?

Did I cut your answer off, sir?

A. I was going to say that the forms——

Q. Pardon me; do you have something else to answer me on that question?

A. I was going to say that the forms were also going to be used down on 1068. [2379]

Q. Where is that provision in the sub-contract on 1068?

A. There is no such provision on that.

Q. Where is any writing that you have, giving you that right, sir?

A. That was verbal.

Q. Well, I'm talking about anything on the date of the sub-contract, sir?

A. There isn't anything in writing on that.

Q. Do you have anything else to say about that, Mr. Schaefer?

A. Well, it would just be unthinkable that Macri was going to pay for those forms on 1062, where we didn't have lumber on time, and so forth, and then provide altogether new lumber for the next job ahead, when he could move these here forms right down, and which they did do, they took these forms down to 1068.

Q. Don't you remember, sir, of my asking upon your examination in chief if you had complied with that provision of 1062, and your answer was that

(Testimony of M. C. Schaefer.)

Macri didn't give you time, that he took the stuff away? A. That's right.

Q. So your answer is it would be unthinkable that he wouldn't permit you to use them on 1068?

A. Well, that he wouldn't—yes, that's right.

Q. Now, is it or is it not a fact that you received two checks with vouchers attached? [2380]

A. I believe that's right.

Q. And do you have those vouchers, Mr. Schaefer?

Mr. Olson: Your Honor, that's not proper cross-examination. I've asked counsel to produce the checks themselves.

Mr. Holman: Well, I'll get them, your Honor, but I just am unable to get them; I was merely asking if you have those vouchers; if you have, I'd like you to produce them.

The Court: I'll overrule the objection.

Witness: I imagine counsel or Mr. Hendershott have them.

Q. Would you please step down and get them? We're talking about the same checks, Mr. Schaefer.

Mr. Holman: May I have these marked for identification, and your Honor, I request that the clerk make copies, and that the pencil memos on these be erased—I mean, not be erased, but be not shown on the copies, and then the originals returned to counsel it's from their file. I'd like to have them marked for identification.

(Whereupon, voucher received by Schaefer with check re estimate 11 was marked Defendant Macri's Exhibit No. 127 for identification.)



(Testimony of M. C. Schaefer.)

(Whereupon, voucher received by Schaefer with check re estimate 12 was marked Defendant Macri's [2381] Exhibit No. 128 for identification.)

Q. Handing you what has been marked Macri's identification 127, coming from your files, sir, and disregarding the pencil notations on there entirely, and Macri's identification 128, also from the same source, and calling your attention to the showing in Mr. Hendershott's compilation of receipt of \$2985.46, did you receive that check with that voucher? A. Yes.

Q. All right, sir; then calling your attention to April entry of \$7050.50, did you receive that with that voucher, sir? A. Yes.

Mr. Holman: I offer these in evidence, your Honor, and if counsel still desires the checks I'll be glad to look them up and bring them.

Mr. Olson: No objection.

The Court: Admitted.

Mr. Holman: Do you still want the checks?

Mr. Olson: I would like the checks.

Mr. Holman: I'll bring them.

(Whereupon, Defendant Macri's Exhibit No. 127 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 128 for identification was admitted in evidence.)

Mr. Holman: That's all my cross-examination.

(Testimony of M. C. Schaefer.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, I believe you testified yesterday that Mr. Staples told you that he could have gotten hold of Mr. Macri, but Macri had left instructions with him not to bother Macri unless there was something serious, is that right?

A. Not to get hold of him unless he had to.

Q. Unless he had to? A. That's right.

Q. And that conversation you had with Mr. Staples was on the 15th of June, was it not, sir?

A. That was on the 29th of April.

Q. Oh, that was on the 29th of April?

A. That's correct.

Q. Well, isn't it a fact that that conversation took place on June 15, Mr. Schaefer?

A. It did not.

Q. Isn't that the time that you told Mr. Staples that you would pull the men off the job?

A. No.

Q. You told Mr. Staples that you would pull the men off the job on June 15? A. On April 29.

Q. Now, you had no conversation with Mr. Staples on June 15? [2383] A. On June 15, no.

Q. I misunderstood your testimony yesterday. I understood that you testified that on June 15 Mr. Staples told you he could have gotten hold of Mr. Macri the day before, but Macri had told him not to bother him unless it was very important.

(Testimony of M. C. Schaefer.)

A. No, if I made that statement as on June 15 that's an error.

Q. That occurred on the 29th of April?

A. On the 29th of April.

Q. With reference to the transit mixer, Mr. Schaefer, your objection, as I understand it, to the use of the transit mixer on the job is that it will delay the pouring because you have to make trips back at the end of each pour.

A. It is not as economical, and——

Q. Well, now, by that you mean that it will cost more money?      A. It will cost more money, yes.

Q. Now, why?

A. It's going to take at least one man more; you've got a bigger investment, and if we were to have a continuous pour as had been agreed, the one mixer and the dump trucks that we had, we own the dump trucks, and all we needed up there in addition to our then equipment was the mixer. We do not own any pre-mix trucks.

Q. Well, to get back to the question I asked you, Mr. Schaefer, you would save in that you would not have as [2384] many men on the job, and you would save in that you could get your work done faster, is that right?      A. Yes.

Q. I see. Well, now, according to Mr. Bufton's testimony, the majority of these structures out there were structures that would require about 21½ yards of concrete or cement, is that right?

A. Your structures run about 2 yards per structure, then they were in clusters, singles, doubles and triples.

(Testimony of M. C. Schaefer.)

Q. Now, how many yards of batching would your truck hold, about a yard and a tenth?

A. Our trucks hold three batches.

Q. That would be about  $3\frac{1}{3}$  yards, is that right?

A. Of materials?

Q. Yes. A. Or concrete, we'll say.

Q. Well, let's say concrete.

A. The concrete batches were a little oversize; they were about one and a tenth.

Q. That's what I understood; therefore, if they held three batches, that would be about  $3\frac{1}{3}$  yards, is that right?

A. Enough for  $3\frac{1}{3}$  yards of concrete, yes.

Q. Then with one truck you didn't have to carry a full truck load to pour the average structure out there, did you? A. Now, wait a minute——

Q. Just a moment; answer my question. For the average structure you didn't have to carry a full load of aggregate?

A. Yes, you did, because the average structure was more than a single structure, that is, it was more than one structure per hole.

Q. Yes; in other words, there would be about six yards of concrete per hole?

A. That would be taking an average of two yards per structure, and if the average were two structures to the hole, you would have about four yards.

Q. About four yards? A. Yes.

Q. Then you'd get about  $3\frac{1}{3}$  yards of material in your one truck, and then you'd send out another truck partly loaded, wouldn't you, for that cluster?

A. That's right.



(Testimony of M. C. Schaefer.)

Q. So that the second truck would be operating only half full, or thereabouts, would it not?

A. And then pull on to the next location.

Q. I beg your pardon?

A. I say, and then you'd move on to the next location.

Q. Well, yes, you'd move the Mixomobile on to the next location.

A. Yes. [2386]

Q. And you couldn't use the balance of the material in that truck until the mixer was moved?

A. That's probably correct.

Q. So you would have the truck tied up during the balance of that time?

A. That's right.

Q. Well, wouldn't that offset the time that with a transit mixer you could go right ahead and pour?

A. No, you'd move this here equipment that we had on that job just about as fast as you're going to move a transit mixer on that job.

Q. Well, I'm speaking of a transit mixer on a truck; not one you're going to pull.

A. Our mixer is also on a truck.

Q. I appreciate that, but you also had a truck tied up while you moved that mixer. If you had a transit mixer you could move right on to the next structure.

A. Yes, sure you could.

Q. And you wouldn't have your trucks tied up.

A. You wouldn't? What would you have your pouring equipment on?

Q. I beg your pardon?

A. I say, you still had some truck to move your pouring equipment.

(Testimony of M. C. Schaefer.)

The Court: It isn't proper for the witness to [2387] ask questions. You try to answer him. Go ahead.

Q. Mr. Schaefer, when you estimated it would take  $3\frac{1}{2}$  man hours per cubic yard to excavate ground by hand, did you have in mind using a pick? A. Using a pick?

Q. Yes.

A. There was a little pick work there, yes.

Q. But not much? A. No.

Q. In other words, you had in mind just plain shoveling for the most part? A. That's right.

Mr. Hawkins: I think that's all.

#### Cross-Examination

By Mr. Ivy:

Q. Mr. Schaefer, you made response to counsel that you couldn't submit a bill until the job was finished, for the additional cost. Will you please explain that?

A. How could I determine what my bill was to be until I was through with the job?

The Court: Well, answer the questions.

Mr. Olson: Mr. Schaefer, just answer the questions.

A. Well, I couldn't determine what my cost was until I was through with the job.

Q. Then no detail at all was kept of any additional costs, is that correct? [2388]

A. No, we didn't keep the cost in that manner, no.

(Testimony of M. C. Schaefer.)

Q. You have no record, then, of any of the additional costs which you are stating that Mr. Macri caused you over and above your contract?

A. We had a certain amount of segregation in our daily reports, but there is so much of the work that you just couldn't segregate.

Q. Was it a part of your agreement with Mr. Macri on April 29, and again spoken of on June 15, that no detail of additional cost would be submitted until the end of the job?

Mr. Olson: That's not proper cross-examination, your Honor.

The Court: Overruled.

A. No, there was no such conversation, that is, there was no conversation on that point.

Q. There was no agreement on that point?

A. There was agreement that he was going to pay for all our additional cost and expense. He was going to pay for all our costs.

Q. But you kept no record of the additional cost, is that correct?

A. Not as such, no. They weren't segregatable. You couldn't segregate them. He was going to pay for all our costs.

The Court: Well, that last is not responsive, and [2389] will be stricken. I thought there was no question here at this stage of the trial that there has been no effort to segregate the costs. You make no claim of that, do you, Mr. Olson? I think your contention is that the oral contract entirely superseded the written contract, and that there was no

(Testimony of M. C. Schaefer.)

occasion for a statement being made or rendered as to additional cost. Is that your position?

Mr. Olson: That is our position with reference to the oral agreement, your Honor.

Mr. Holman: I was trying to get in an objection and move to strike to Mr. Ivy's interrogation on the last three questions, on the ground it was their case in chief, and it was not proper rebuttal, but I guess I arrived too late. I'm sorry. The point I'm making, as far as Macri is concerned I don't want to be called upon to again refute the statements on Mr. Ivy's cross-examination.

The Court: I think that's correct. It won't be regarded as evidence against Macri.

### Redirect Examination

By Mr. Olson:

Q. Mr. Schaefer, did you have any discussion with Mr. Macri relative to the use of forms that were used on 1062, on 1068? A. Yes.

Q. Would you state when that conversation took place?

A. Well, that conversation took place at the time that we [2390] signed the second contract, and at the time, or at a meeting previous to the time of signing the contract, the time I quoted him the price on the job.

Q. And what was said about it, Mr. Schaefer?

A. Well, he said "It isn't going to cost you as much on this job, because you can take the forms on from the first job right on to the second job and use them."

Mr. Olson: That's all.



(Testimony of M. C. Schaefer.)

Recross-Examination

By Mr. Holman:

Q. Where was the other conversation, you said at the time of signing the second contract, where was that? A. Signing the contract?

Q. Yes, where was that?

A. That was in the Stadium Homes job office.

Q. And where was the conversation that you said preceded that?

A. We were out on the field, and went over the job on 1068.

Q. When?

A. I couldn't give you the exact date on that. It was previous to the signing of the contract on 1068.

Q. Yes, sir, but when?

Mr. Olson: He says he can't say.

Q. Well, let's approximate it. What's the date of your second contract, the sub-contract, you term that, do you not? We don't need to test memory; it's dated, is it not, [2391] April 21?

A. April 21.

Q. Yes. Now, how long before that?

A. Oh, it may have been a couple of weeks.

Q. And you gave Mr. Macri those figures out in the field at that time, did you not, your figures?

A. I believe I gave those figures to him.

Q. Those are the ones you identified here the other day?

(Testimony of M. C. Schaefer.)

A. I believe that's where I gave him those figures.

Q. I can't recall the exhibit, I don't remember the number; the one I showed you the other day?

A. Yes.

Q. 78; and who was present at that time?

A. At the time when we had that conversation?

Q. In the field, yes, sir.

A. Well, that conversation I believe took place in the job office on 1062.

Q. Yes, but tell me who was present? Now you take it out of the field and put it in the job office, is that correct?

A. Well, that is, we went over the field that day, over 1068, and returned to the job office on 1062.

Q. You went over the field on 1068 and came to the job office on 1062?

A. That's right.

Q. All right; now, who was present? Was Mr. Hendershott [2392] present?

A. No.

Q. Mr. Darcy?

A. Brother Bill. I wouldn't say that brother Bill was right there at that time that we had this part of the conversation. It was on that day brother Bill, Mr. Macri, Mr. Nelson and I drove over the job site on 1068.

Mr. Holman: I move that be stricken, your Honor. I asked who was present at that time.

The Court: I think what counsel wants to know is this conversation that you've related, was that in anybody else's presence so far as you remember, and if so, whose presence. Is that what you want to know?

(Testimony of M. C. Schaefer.)

Mr. Holman: That's right.

A. I wouldn't be able to say whether Mr. Macri and I were alone or whether brother Bill happened to be there; I couldn't say.

Q. Then at the time of signing the contract, who was present at that conversation?

A. There was Mr. Macri and myself; there wasn't anyone else right there.

Q. Brother Bill?

A. No, brother Bill wasn't there. There were other office help there, but they weren't paying attention to our conversation, I'm sure. [2393]

Q. They weren't interested in the conversation?

A. They didn't have any interest in the conversation.

Q. And you would fix the prior meeting out in the field where you have detailed this conversation as in April, and shortly preceding the signing of the sub-contract, Exhibit 6, would you not?

A. I wouldn't be able to state now whether it was two weeks or more; I'd say in the neighborhood of two weeks previous to signing.

Q. Mr. Schaefer, when you testified in chief you had a memo of each time you were on this job, and read it, did you not?

Mr. Olson: That's not proper cross-examination.

A. I don't remember that.

Q. Sir? A. I don't remember that.

Q. And by reference to your memo you can't give me the date, huh?

A. I can give you lots of dates of the times when I was out on the job.

(Testimony of M. C. Schaefer.)

Q. No, I'm talking about this same conversation; nothing else in the world.

A. But I couldn't offhand give the date of the conversation.

The Court: The question is, can the witness give or can he not give the exact date of the conversation? [2394]

Mr. Holman: That's correct.

The Court: Can you answer that, Mr. Schaefer?

A. I cannot.

The Court: All right, proceed with the examination.

Q. Was it in the month of April?

A. I believe so.

Mr. Holman: That's all, your Honor.

The Court: Any further questions?

Mr. Olson: No, your Honor.

The Court: Mr. Hawkins?

#### Recross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, perhaps I was laboring under a misapprehension. You did take your men off the job in June, 1944?

A. We did take the men off the job, yes.

Q. That's evidently what I was thinking of, and as I understand it, you did that because Macri was not excavating according to your requirements?



(Testimony of M. C. Schaefer.)

A. At the time that there were no men on the job there was no excavating, no fine grading ahead of us, that is, no fine grading ahead of us, and there was no lumber or material in the yard for the men to work on. We did have two men at the time, that I pulled off the main crew, we did have two men, I believe it was Klug and Monrad, working in the field, and when they wound up with the form [2395] lumber that was then in the field, and tied a certain amount of steel, there was a period of ten days that they pulled off the job. There just wasn't anything for them to do.

Q. Well, the reason you moved off the job was because you couldn't make any money on the job under those conditions?

A. It was because we didn't have any material.

Q. And it was because you couldn't make any money; you would operate at a loss under those conditions?

A. No, that wasn't it. My bond kept me tied to that job.

The Court: Any further questions?

Mr. Holman: Your Honor, I would like to ask this witness one further question.

The Court: We'll have to conclude with this witness some time. I don't know how many cross-examinations there have been, but it is at least six; now ask your question, Mr. Holman.

(Testimony of M. C. Schaefer.)

### Recross-Examination

By Mr. Holman:

Q. I'm calling your attention to the detail of the times you were on the job in the month of April, 1944, namely April 12, 27, 28 and 29. Now, can you tell me whether or not it was April 12 you talked to Mr. Macri, or some other day?

Mr. Olson: The witness has already said about four times it was about two weeks before the contract was [2396] signed.

The Court: I'll overrule the objection. He may answer if he can.

A. I couldn't specify the date on that right now. No, I can't.

Mr. Holman: That's all.

The Court: Any other questions?

Mr. Olson: No.

(Whereupon, there being no further questions, the witness was excused.) [2397]

### PATRICK L. DARCY

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

### Direct Examination

By Mr. Olson:

Q. Mr. Darcy, it was testified here that Mr. Curtis Sheffield was an employee of Mr. Macri and was in charge of fine grading. Do you remember Mr. Curtis Sheffield?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. And would you state what he did on 1062, as Macri's employee?

A. Well, I've seen him do just about everything there was to do there, except for supervision, except fine grading.

Q. Well, what was his chief occupation with reference to [2398] what he did?

A. Well, he drove the truck and supplied various crews, hauled men back and forth from one operation to another, took fuel and equipment, stuff to the shovel, and he helped lay out for the shovel, especially on pipe line trench, and he hauled materials.

Q. Did he do some fine grading?

A. He never did any fine grading on that job from the time I went on there until he left the project.

Q. Did he supervise any of it?

A. No, he didn't supervise any of it.

Q. Now, you were here when Mr. Arthur Anderson testified?           A. Yes.

Q. He testified at one time that he talked with you on the job nearly every day. Is that true?

A. That's not true.

Mr. Holman: I challenge that statement, your Honor. It was nearly every day that he was there. Your Honor will recall that I cross-examined Mr. Anderson and asked him what he meant by "was there."

The Court: He said he went over the job nearly every day. I think it would be proper to ask Mr. Darcy how often he did talk with Mr. Anderson.

(Testimony of Patrick L. Darcy.)

Q. (By Mr. Olson): Mr. Anderson's testimony was quite inconsistent in places, but I did have that note. How [2399] often did you talk with Mr. Anderson, and under what circumstances?

A. Well, the first three months that I was up there it was very rarely, possibly once a week, that I saw him, until Murphy-Campbell turned over their work, the bonding company assigned it to somebody else, and he went with it, and he moved into Collucio's camp, right across the road from our camp.

Mr. Holman: Your Honor, I move that portion of the witness's statement with respect to Murphy-Campbell transactions with the bonding company be stricken.

The Court: It will be stricken.

A. From the time he moved over to Collucio's camp, then, I saw him two or three times a week, from two seconds to a minute or so, mostly when we'd pass on the road and stop and talk a minute and go on.

Q. Did you see Mr. Anderson out of his car and out on the project 1062, inspecting the structure excavations? A. No, I never did.

Q. And were you around these excavations that you were working on, yourself, while you were there?

A. Yes, back and forth, on them four or five times for every one that was set.

Q. Now, there's been considerable testimony here about the operations of this shovel or hoe. Did you see that hoe [2400] in operation?



(Testimony of Patrick L. Darcy.)

A. I quite often stopped and watched the shovel operating, digging the structure excavations.

Q. And would you explain the operation of that shovel with reference to whether or not it could and did leave vertical banks after it completed its rough excavation?

A. Well, on a rough excavation it usually left an almost vertical bank on one side.

Q. Which side?

A. The side next to the machine. The natural action of the dipper on the dipper stick is an arc down to a position approximately a track width below the track level. From there it can operate on a plane to itself, and then it can be raised absolutely vertically; as it comes down and digs across the bottom of an excavation then it can be lifted straight up and dumped.

Q. And the side where it could be lifted vertical would be what side or end with reference to the machine?

A. The nearest to the machine.

Q. Now, then, what slope, if any, was left by the hoe operation? Where would that be with reference to the portion of the excavation which was to be occupied by the structure?

A. Well, the teeth of the dipper would start in at a lateral clearance about a foot outside of where the structure [2401] would be, then it would cut down and leave a corner, and that bank would have to be plumbed up by hand.

Q. And that corner that would be left, where would that be with reference to that part of the excavation where the structure was to be placed?

(Testimony of Patrick L. Darcy.)

A. Well, it would run from what should have been the clearance outside the structure to under where the structure would sit.

Q. Did you, Mr. Darcy, make a little diagram illustrating the testimony you've just given?

A. Yes.

(Whereupon, Diagram of excavation, by Darcy, was marked plaintiff's Exhibit No. 129 for identification.)

Q. Mr. Darcy, showing you plaintiff's identification 129, I'll ask you what that is?

A. That's a diagram showing an excavation as roughed out by the hoe in a solid pencil line, and in dotted pencil line the fine grading that would be necessary in that hole as the holes were that we worked in, and the red lines showing in solid red line, an outline of the head wall of the structure with the inlet made, and the dotted red lines through that head wall shows where a cross cut section of the box would be, and the floor of it, and on the bottom of the diagram, in a dotted line, shows how the sub-wall would extend down into the undisturbed dirt.

Q. Do you show on that diagram a typical bank left by the hoe after completion of its part of the excavation operations?

A. Yes, that's indicated in the solid pencil line.

Q. By the solid pencil line? A. Yes.

Q. Which portion or which part of that diagram would the hoe be placed in making that excavation, or do you show that on there?

(Testimony of Patrick L. Darcy.)

A. The hoe would be operating from the right side of the hole as it shows on the diagram, digging from the left side to the right.

Mr. Olson: We offer plaintiff's identification 129.

Mr. Holman: Let's see it. May I ask a question of the witness?

The Court: Yes, on the admissibility.

Q. (By Mr. Holman): Mr. Darcy, was this made up from any particular structure that you can designate as to number? A. No, it is not.

Q. All right, sir; then all dimensions on this are of your own devising, to indicate the operation?

A. No, they're an average of six structures.

Q. What six?

A. Just going from the front of the book through, taking that type structure as I went.

Q. May I understand, you went through, you say the front of the book, you mean Exhibit 3, the contract, typical forms, or the lay-out?

A. The structure lay-out plan.

Q. Did you make any note of the structures you used?

A. No, I just marked down the depths and averaged them up. The head walls ran from eight feet to eleven feet wide.

Q. And you took both the shallow and the deep structures, and got an average from that?

(Testimony of Patrick L. Darcy.)

A. I took the depth of each one of those structures and averaged them up.

Q. Well, did you look for deep structures?

A. No, just as they came.

Q. Did you take any of the shallow structures?

A. Yes.

Q. How shallow?

A. The shallowest one was three and a half feet deep.

Q. And did you take any of the deepest?

A. There was one that was a little over five feet.

Q. Is that the deepest?

A. That's the deepest I checked.

Q. Is that one on which you made model 25, as a replica? [2404]

A. No, that's an entirely different type structure. These are all boxes, with a head wall. That's either an inlet or outlet of a pipe line.

Mr. Holman: Well, subject to not being bound by the witness's average of structures, I see there is no objection to this being admitted, illustrative of his testimony.

The Court: Any other objection?

Mr. Hawkins: No, your Honor.

The Court: It will be admitted for the purpose of illustrating the testimony of the witness.

(Whereupon, plaintiff's Exhibit No. 129 for identification was admitted in evidence.)



(Testimony of Patrick L. Darcy.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, showing you plaintiff's Exhibit 49, and directing your attention to picture number 81, I'll ask you if you can recognize that picture as being an excavation made by hoe operation?

A. Yes, that's the excavation for structure number 12 on 1068, where the first lateral on that project crosses the county line road.

Mr. Holman: Your Honor, I submit this is not proper rebuttal.

The Court: It pertains to the manner of operation of the hoe, doesn't it? [2405]

Mr. Holman: Yes, but they put these pictures in and testified about them on the case in chief.

The Court: Well, he can call attention to any that illustrates his testimony as to whether the hoe cut a vertical bank or not. Go ahead.

Q. (By Mr. Olson): Can you tell, Mr. Darcy, from your recollection, where the hoe was with reference to that picture?

A. You mean when it dug the hole?

Q. When it dug the hole, yes.

A. It dug from the far end of that hole.

Q. And from the far end, that would be the end shown nearest the top of the picture?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. So that that portion of the hole would be nearest to the machine? A. Yes.

Q. I call your Honor's attention to the picture. Now, Mr. Anderson also testified, I believe, Mr. Darcy, that one man should hand excavate, or rather, fine grade, five structures per day as the holes were left by the hoe. Now, state whether or not that was possible, for one man to excavate an average of five structures in the manner in which the hoe excavation was left?

A. That's absolutely impossible.

The Court: Wait—did you have an objection?

Mr. Holman: I object to counsel's question when he says "excavate." The testimony was fine grading.

Mr. Olson: Well, I'm referring to fine grading.

The Court: Whose testimony are you referring to?

Mr. Olson: Mr. Anderson. Counsel objected to the form of my question. If I asked it the way counsel says I did, I certainly didn't mean to.

The Court: Well, as I understood Mr. Anderson's testimony, he made an estimate of what it would cost to excavate these structures entirely by hand.

Mr. Holman: That's Mr. Hance.

The Court: All right. Reframe your question.

Q. (By Mr. Olson): Mr. Darcy, Mr. Anderson testified that one man could fine grade by hand approximately five structures per day, taking a hole left the way they were left by the hoe excavation.

(Testimony of Patrick L. Darcy.)

Now, I'll ask you whether or not one man could excavate, hand excavate, that portion of the fine grading per day, or average that, on the type of structures on this job, from the condition in which the holes were left by the hoe?

A. No, it is absolutely impossible.

Q. Now, Mr. Ashley testified, I believe, Mr. Darcy, that he requested from you a list of the entire amount of lumber needed for the completion of the 1062 project. Did he do that? [2407]

A. He did that soon after I went on the job up there, but I told him I hadn't had time to check up and see what forms we had on hand and how much material would be needed; that I'd give it to him as soon as I could get that checked up and figured out.

Q. Now, were you present with Mr. Schaefer at the time he testified to having a conversation with Mr. Ashley in Coeur d'Alene, Idaho? A. Yes.

Q. And did you participate in that conversation with Mr. Ashley on October 26, 1946?

A. Yes, I did.

Q. Now, did Mr. Ashley at that time state in substance or effect that the running of Mr. Macri's job was in fact a two-man job, but that Mr. Macri—and for that reason he requested that Mr. Staples stay on the job, but that Mr. Macri would not permit it? A. Yes, that's what he said.

Q. Did Mr. Ashley further state at that time that Mr. Macri called him and asked why Mr. Staples was still on the job, and that Mr. Ashley

(Testimony of Patrick L. Darcy.)

replied that he was still learning the job, and that Mr. Macri then replied to Mr. Ashley in substance that "You had better learn quick, because Mr. Staples has to get off the job"; did Mr. Ashley make those statements to you, in substance or [2408] effect, at that time?

A. Yes, that's what he told us.

Q. Now, at the same time and place, Mr. Darcy, did you have a conversation with Mr. Ashley as to what had caused his blow-up with Mr. Macri?

A. Yes, I did.

Q. Would you state what was said?

A. Well, I asked him myself, I said "Verne, I'd like to have you tell me just one thing, the straight of it; I'd like to know what caused your blow-up with Macri, and why you left the job."

Q. What did he say?

A. Well, he enumerated several things, including a lack of machinery.

Mr. Holman: Just a minute; counsel asked him what he said.

A. Well, he said because he didn't get the machinery he needed when he asked for it, because he couldn't get lumber when it was needed and asked for, he said he had negotiated with two different engineers to take over the grading, engineering, on that work, but when he had consulted with Mr. Macri he refused to pay the required wage scale for that kind of labor, and he couldn't put them on, because they wouldn't work for any less, and he didn't have equipment to handle fine grading crews [2409] or get them around on the job.



(Testimony of Patrick L. Darcy.)

Q. Now, Mr. Darcy, Mr. Ashley further testified in substance that he had sent you some fine graders to fix up the holes, along with your workmen, and that after a few days you told him they didn't want the fine graders any more, and for him to get them out of your way. Did you state in substance such a state of facts to Mr. Ashley?

A. No, I never did. We never had any fine graders sent to us for that job.

Q. What was the situation with reference to fine graders sent back when you requested them from Mr. Ashley?

A. Well, as I said, from the time I first got there until Ashley left the job the only time we ever had a fine grader up there to do work was Ashley himself, or a Mexican lad, I think his name was Hernandez, and when that laborer came up to grade excavations we reported to Ashley how long he'd have to sit there, two or three hours, waiting for Ashley to tell him what was wrong and how to do it, and usually Verne would get him started and leave him, and he'd only tell him on one or two, and then he'd possibly spend the rest of the day sitting out there waiting.

Q. Now, did you tell Mr. Macri at any time you did not need the chute lumber until the end of the job?

A. No, I did not. [2410]

Q. Did you ever give Mr. Macri direct a list of lumber needed for the chute?

A. Yes, the third time that was ordered.

Mr. Holman: I move that last be stricken.

(Testimony of Patrick L. Darcy.)

The Court: It may be stricken.

Q. About when did you give Mr. Macri the order for the chute lumber?

A. Along the early part of October; I don't remember exactly the date.

Q. How many times did you order the chute lumber? A. Four times.

Q. Do you have the dates that you ordered it?

A. The 16th of October, the third time it was ordered.

Q. Do you have the dates that you ordered it all four times? A. Yes.

Q. Would you state when you ordered it, and to whom you gave the order?

A. Well, I personally delivered the order on July 22, although I didn't make that order up, I just delivered it as it had been figured up. It was delivered June 21, July 22, October 16, and the Saturday before Christmas, 1944.

Q. You went too fast for me; June 21; July 22;—

A. October 16, and the Saturday before Christmas; I think that was the 21st of December, 1944.

Q. Now, were any of those orders given to Mr. Macri personally?

A. Yes, on the 16th of October.

Q. And on the order given June 21, did you give that order?

A. That was given by John Klugg.

Q. The September 22, who was that order given to—I mean July 22.

(Testimony of Patrick L. Darcy.)

Mr. Holman: Pardon me; did you say the last was given by John Klugg or to John Klugg?

A. The order was given by John Klugg.

Q. Now, your July 22 order was given to whom?

A. I gave the copy of that to Ashley.

Q. And your October 16 order was given to whom? A. To Mr. Macri himself.

Q. And your December 24, or 21, the Saturday before Christmas, who was that to?

A. That was given to Sam Burnsted to take into the Seattle office when he was going in for Christmas.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Thursday, *October 20, 1947*  
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may the record show that [2412] I am handing to counsel, as I have already handed him before the Court re-convened, Macri check 1022, March 9, 1945, for \$2,985.46, and perforated as paid, and check number 1185 for April 28, 1945, for \$7,050.50, perforated as paid, and bearing the endorsement on the side; "payment of sub-contract, specification 1062, estimate number 12, March."

(Testimony of Patrick L. Darcy.)

Mr. Olson: I would like the record to show also, your Honor, that the two checks were given to me on the condition that I make photostatic copies of them, and because of the conditions under which they were handed to me, I now return them.

Mr. Holman: I will assume the photostatic copies your Honor, if he wants to offer them.

Mr. Olson: Your Honor, we offer into evidence at this time our identification 32, that being the copy of the letter addressed to Macri and Company under date of February 13, 1945, purporting to have enclosed the monthly statements which are identification 119.

Mr. Holman: Well, your Honor, we're in the same position on this we were before. Your Honor will recall this came up early; it doesn't show who wrote the letter, we have never received it, and it is a carbon copy, and counsel on his previous offer of it, as I recall, said he thought it came from Mr. McKelvey's office, and I [2413] questioned that very much, because it didn't contain the usual indication of McKelvey's initials and some stenographer typing it, nor does it bear Mr. McKelvey's name. It is absolutely strange to us.

The Court: It is a copy ostensibly directed to Mr. Macri, and there's been no evidence of it having been mailed?

Mr. Olson: That's true, your Honor.

The Court: The objection will be sustained.



(Testimony of Patrick L. Darcy.)

Direct Examination

(Continued)

By Mr. Olson:

(Whereupon, the reporter read the last previous answer.)

Q. Now, after that, Mr. Darcy, did you have a conversation with Mr. Macri relative to the chute lumber?      A. Yes, about the——

Q. When?

A. Oh, the 5th, I think it was, of January.

Q. Where?

A. On the job; the 5th or the 6th; it was a Friday of that week.

Q. And what did Mr. Macri say?

A. Well, he wanted to know what that much lumber was wanted for, so I explained to him that due to not having had delivery on it before, to carry the operations on the chute work along with the other work, that we would have [2414] to do it all at once, and it would take a good deal more lumber than we had previously ordered for that, and we had to have that much lumber to do that work then, that late in the job.

Q. Did he say whether or not that lumber had as yet, that late, been ordered?

A. He said it hadn't been ordered, but that he understood what it was for; he'd get it over there as soon as he could.

(Testimony of Patrick L. Darcy.)

Q. Now, do you recall on or about the 9th day of September, 1944, a representative of a lumber company from Klickitat being on the job?

A. Yes.

Q. And were you present when the representative talked to Mr. Mose Stickney——

A. I took him——

Q. ——foreman of Mr. Macri's job; were you present?

A. I took him to Mr. Stickney.

Mr. Holman: I wish to object to this inquiry as having been covered on direct examination by their own witness, Stickney.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I don't recall having asked Mr. Stickney about this representative from Klickitat Lumber Company. I asked Mr. Macri about it, and Mr. Macri denied it, but I don't believe I asked Mr. Stickney a thing about it.

The Court: Overrule the objection.

A. Yes, I was there. I took him in to meet Mr. Stickney.

Q. And would you state what this salesman from the lumber company said, if anything, in your presence?

Mr. Holman: That I object to as hearsay.

The Court: Well, it would be, unless it is impeachment of Mr. Stickney. Was it?

(Testimony of Patrick L. Darcy.)

Mr. Olson: No, I'm speaking of Mr. Macri. I think counsel's point is well taken on that.

Q. (By Mr. Olson): Did you hear a 'phone conversation at that time, Mr. Stickney's end of it, with Mr. Macri? Were you there when he called Macri? A. Yes.

Q. Now, would you state what you heard Stickney say afterwards with reference to what Mr. Macri had said?

Mr. Holman: I object to that. They had the witness Stickney on the stand, the one who was actually telephoning, if he did telephone, and they either asked him about it or they didn't, in their case in chief, and certainly this is not proper rebuttal.

The Court: It seems to me it would be hearsay, if you're asking for what Mr. Stickney, after he turned away from the 'phone, said Mr. Macri had said on the 'phone. It wouldn't be a conversation in Mr. Macri's presence.

Mr. Holman: He's asking him to say what Stickney said in that 'phone call to Mr. Macri, and certainly that would be hearsay, at least until it was established there was a 'phone call between Stickney and Macri, and if there was, your Honor, Mr. Stickney was here on the stand, and this is certainly not proper rebuttal.

Mr. Olson: I don't understand. I could ask Mr. Stickney on the stand as to what Mr. Macri had said to him in that conversation, but the purpose of asking this is that Mr. Macri denied this con-

(Testimony of Patrick L. Darcy.)

versation. Now, I'm offering to show that Mr. Macri's foreman after completing a 'phone call in Mr. Darcy's presence, said what Mr. Macri had said.

Mr. Holman: My position still is that it is part of their case in chief, and they had the very witness they claim was participating, and they either asked him about it or they didn't, therefore it is not proper rebuttal.

The Court: It wouldn't be part of their case in chief, if Mr. Macri had admitted having such a conversation, but I think if Mr. Macri denied he had a conversation, [2417] you would have to prove it by the witness Stickney, otherwise it will be what Stickney told this witness Macri had said. The objection will be sustained.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, between the dates of November 30, 1944, and January 3, 1945, will you state whether or not you had form panels adaptable to use on job 1068, which were then ready and available for use on 1068, had excavations on 1068 been ready for their use? A. Yes, we did have.

Q. And those forms were from what source?

A. They were forms that would no longer be needed in the structures, that remained to be poured on 1062; had been cleaned and piled, ready to go



(Testimony of Patrick L. Darcy.)

to 1068, if and when we started any operation there, or to be turned over to Macri if we didn't.

Q. Now, with reference to the chute on the Mixomobile, Mr. Darcy, what was the use and purpose of that chute?      A. Well——

Mr. Holman: Again I submit that is not proper rebuttal. Their entire equipment was fully explained on their case in chief, including the matter of these chutes, both before and after the elevator was removed.

The Court: I assume the purpose is bearing upon the relative efficiency of the Mixomobile and other types [2418] of equipment.

Mr. Olson: Yes, your Honor. Counsel interrogated at some length on the use of the chute, and indicating it is not proper.

The Court: Overrule the objection.

A. The use of that chute, and the main plan in having it made in sections, so we could take off or add sections, is so that we'd only have to make one set-up of the mixer at the structure. Some of those would be 22 feet wide, and quite a distance, so we would use the chute, all the sections, to pour on the far side of the structure, and as the pour came nearer, reduce the length by taking off sections, and then when you get next to the structure, possibly have to pull the mixer up a few feet for the last piece of chute to be able to reach the nearest walls. That eliminated the use of staging and wheelbarrows, extra stuff that would be necessary in handling and making the pour.

(Testimony of Patrick L. Darcy.)

Q. Mr. Darcy, did you require or was there used in your performance of 1062 any four by eights? A. What was that?

Q. I say, was there required or did you use in your performance of 1062 any pieces of lumber that were four by eights?

A. No, nothing that size.

Q. Do you recall what a four by eight was used for, and by [2419] whom it was used?

A. Macri's crew used four by eights for runners on a sled that they built to haul equipment around for the pipe line crew.

Q. How about three by tens? Did you use any three by tens on this job 1062?

A. Only those that we cut up for blocks to block up the mixer, and then ripped into two by threes for structure forms, studs on the outside panels of the chute forms.

Q. Well, did Mr. Macri use any lumber on this job in connection with his operations?

A. Yes, they used quite a bit of heavy stuff.

Q. What did they use them for?

A. Temporary bridges over open ditches on road crossings, and, well, two or three places where they had to cross the open ditches, that couldn't be filled when they had to be crossed, out in open fields, and there was a truck bed built, and then there was a frame work built up there in the yard to hoist engines out of trucks that were being repaired.

Q. Do you remember what type of lumber was used for that hoisting those motors out of the trucks?

(Testimony of Patrick L. Darcy.)

A. Well, the main beam must have been around a four by eight, or heavier, and then there was some heavier pieces for legs under it, and some heavy bracing, I think about [2420] four by four bracing on it.

Q. Showing you Macri's Exhibit 104-32, I'll ask you if you recognize the lumber shown on that invoice as being any lumber which you used or the Concrete Construction Company in connection with 1062; or can you say what it was used for?

A. Not that amount from that source. We used some of that dimension on the chute, but it came from Seattle on a big load.

Q. Did Mr. Macri use any lumber of that type?

A. There was that size of lumber went into that truck bed, two by ten.

Q. Was there any lumber used in connection with the pipe laying operations?

A. Yes, they used some heavy planks, two inch stuff, and then the stuff that went into that sled that they hauled their equipment on; two sleds built, because one of them wore out.

Mr. Olson: That's all; you may examine.

#### Cross-Examination

By Mr. Holman:

Q. With reference to 104-32, do you know whether or not Mr. Macri got the heavy timbers you spoke of from the Bureau of Reclamation itself?

A. No, I wouldn't know where they got them.

(Testimony of Patrick L. Darcy.)

Q. You don't know, do you, sir? [2421]

A. I don't know where that stuff came from.

Q. Now, you don't claim, do you, Mr. Darcy, that with respect to 104-32, which is dated November 27, 1944, you have a specific memory as to these particular items that are listed here, do you?

A. I know at the time that we didn't receive any of that dimension of lumber.

Q. Well, when you say we didn't receive——

A. Concrete Construction Company.

Q. Is it or is it not a fact that the lumber was received by John Klugg? A. Very seldom.

Q. And is it or is it not a fact that John Klugg was the man who fashioned the lumber?

A. Did what?

Q. Fashioned, shaped it?

A. To a great extent, yes.

Q. Absolutely, was it not?

A. It was not absolutely.

Q. Do you say that John Klugg did not attend to your job yard work from beginning to end?

A. He did, but a good deal of it under my supervision or instruction.

Q. Never mind that; he did, didn't he?

A. He did the work, yes. [2422]

Q. And John Klugg was in a position to know all the lumber that came into the yard?

A. I wouldn't say that he was.

Q. Well, would you say that he was not?

A. Some of the time he wouldn't be there to know about it.



(Testimony of Patrick L. Darcy.)

Q. And he stayed away, to never know anything about it?

A. I didn't say that he'd never know about it. There were times when he was off the job when lumber was received there. There were times when he was off sick, or on his own business.

Q. What time?

A. The manifests of the daily report will tell that.

Q. Can you tell me, please, sir?

A. Only by the manifests on the daily reports.

Q. You have no recollection of that, sir?

A. No, not as to dates.

Q. How much time was John Klugg off the job, as a total?

A. Well, I wouldn't say without checking it.

Q. Wasn't it a fact, Mr. Darcy, that John Klugg was on the job before you got there, stayed on the job while you were away from it, and was on the job at the end of it?

A. No, I let him go a couple of weeks before the job was completed. We had other work he wanted to get to. He was there when I got there, yes.

Q. You claim this was within one or two weeks of the end of [2423] the job, this 104-32?

A. Oh, no, I didn't.

Q. Did you make any notes of your conversation with Mr. Ashley?

A. Only as noted on the back of the daily reports.

(Testimony of Patrick L. Darcy.)

Q. I'm talking about up at his house—you wouldn't make that note on the back of the daily report—at his office in Coeur d'Alene.

A. Oh, yes, I made notes there.

Q. Where is your notes?

A. I have them in my pocket.

Q. And you could testify without refreshing your memory?      A. Yes.

Q. Where did you make your notes?

A. Mostly while I was sitting there talking to Mr. Ashley.

Q. Did you show them to Mr. Ashley?

A. I didn't show them to him. He knew I was writing.

Q. I'll ask you if it is not a fact that Mr. Ashley stated he would not give you a statement?

A. No, he didn't; he——

Q. Did you get a statement from Mr. Ashley?

A. No, we didn't get a statement from him.

Q. Now, the panels that you were talking to counsel about, being on 1062 and to be used on 1068, are the same panels Mr. Schaefer talked about this morning in testifying? [2424]

A. I presume so.

Q. Well, you know so, don't you, sir? You know that's a fact, isn't it?

A. Yes, I'd say I know it must be the same ones; it's the only ones we had.

Q. And is it or is it not a fact that there were two metal chutes made for this Mixomobile, and that the total length of the two of them was thirty feet?      A. It was not.

(Testimony of Patrick L. Darcy.)

Q. What is the fact, sir?

A. I wouldn't exactly say the length of one piece. We had one piece that was 12 feet long, with three 3-foot additions, and another piece that was loose, to be added if needed.

Q. Twelve feet, plus three of three feet each?

A. Yes.

Q. And then what else?

A. Then there was another piece about ten or twelve feet long.

Mr. Holman: That's all.

The Court: Do you have any questions, Mr. Hawkins?

Mr. Hawkins: Yes, just one or two.

### Cross-Examination

By Mr. Hawkins:

Q. Mr. Darcy, do I understand you correctly that you state that Mr. Ashley did not furnish any fine graders for you? [2425]

A. Not as he stated; he brought fine graders up there to do the work under his instruction, having had a complaint from me as to specified holes and what was wrong.

Q. Whenever you complained he sent fine graders back, didn't he?

A. Not always; he didn't have them.

Q. In most every instance he did, didn't he?

A. Eventually, yes, as soon as he could get help he'd bring them.

(Testimony of Patrick L. Darcy.)

Q. Do you remember your testimony in the beginning of this case to the effect that fine graders were always under your feet?

A. On the latter part of the job, yes.

Q. Not on the first part of the job?

A. The first part of the job there wasn't any to be under our feet.

Q. Although he sent them back in most cases?

A. Just as soon as he could get them he'd bring them back.

The Court: Mr. Ivy?

Mr. Ivy: No questions.

#### Redirect Examination

By Mr. Olson:

Q. What did Mr. Ashley say, if anything, about giving you a statement? A. What?

Q. About sending a statement? [2426]

A. You mean over in Coeur d'Alene?

Mr. Holman: I object to that as immaterial and collateral, your Honor.

The Court: I think he can explain. You went into it. Overruled.

A. He said "I'll give you a statement as to the facts on which you've asked specific information, but I do not want to give a statement for any purpose until I have checked my notes and data on that job, so that I know I am right on the data I give"; and he agreed to mail it the first of the following week, after he had checked his note books and data to make the statement up.

(Whereupon, there being no further questions, the witness was excused.) [2427]



WILLIAM E. SCHAEFER

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Olson:

Q. Your name is W. E. Schaefer?

A. William E. Schaefer.

Q. Now, Mr. Schaefer, did you on or about the 20th day of April, 1944, out in the field of 1062, with Mr. Macri, state to Mr. Macri in going over the excavations that everything was all right?

A. I did not.

Q. Were you present when either of the sub-contracts were signed?      A. No, I wasn't.

Q. Now, were you present on April 29, when Mr. Staples, or when Mr. M. C. Schaefer and Mr. Staples had the conversation which your brother, Mr. Schaefer, testified to relative to Mr. Staples' ability or inability to reach Mr. Macri on the previous day, April 28?      A. Yes.

Q. Would you state what was said at that time?

Mr. Holman: I object to this, your Honor, as having been covered in the case in chief.

The Court: This is to the particular statement?

Mr. Olson: That Mr. Staples denied.

The Court: Mr. Staples denied?

Mr. Olson: Yes, that Mr. Staples denied on cross-examination.

The Court: Overruled.

Witness: That was at the job office, after that meeting; Mr. Staples told M. C. Schaefer and my-

(Testimony of William E. Schaefer.)

self, I heard it, right there, he says "I knew where Mácri was yesterday, [2428] but he told me not to call him unless I had to, and when you told me you was going to pull the men and equipment off the job if this excavation wasn't going to be any better, and get these holes ahead for us far enough so we could work, I thought I had to call him."

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. What time was this at that job office?

A. Sir?

Q. What time was this at that job office?

A. I'd say it was in the afternoon.

Q. What time in the afternoon?

A. I just don't remember what time it was.

Q. Now, what did you say when you told me what he said to Mr. Schaefer, when you told me, or what did you say Staples said to Schaefer?

A. When Schaefer told him?

Q. Yes.

A. That he was going to pull the equipment and men off of the job unless they got more excavations ahead of them, and that the excavations would be right, the fine grading.

Q. This was in April?                      A. April 29.

Q. Yes, sir. How large was your crew at that time, sir?                      A. Sir? [2429]

(Testimony of William E. Schaefer.)

Q. How large was your crew?

Mr. Olson: Whose crew?

Q. Schaefer's crew.

A. At that time the crew wasn't very large. I'd say approximately about 27, or 7, rather.

Q. You mean 7 instead of 27, don't you, sir.

A. That's right.

Q. And what your equipment at that time?

A. We had a skill saw and a band saw and a table saw in there.

Q. That was all, sir?

A. We had pick-ups and I believe one truck.

Q. How many——

Mr. Olson: I don't see the materiality of that. I went into what Mr. Staples said, that's all. He's going back now into the equipment. That means I've got to go back and show whether it was necessary to have any more equipment.

Mr. Holman: I've gone as far as I want to, your Honor. That's what you understood that day in that conversation would be pulled off the job?

A. That's right.

The Court: Any further questions?

(Whereupon, there being no further questions, the witness was excused.) [2430]

Mr. Olson: That concludes our rebuttal, your Honor.

The Court: Do you have anything further, Mr. Holman?

Mr. Holman: I would like to call Mr. Macri with reference to the matter of conversation in Mr. Ashley's office, since that's been brought in now, your Honor.

The Court: In Mr. Ashley's office?

Mr. Holman: Yes, the conversation as claimed to have been between Mr. Schaefer and Mr. Darcy and Mr. Ashley as to what Mr. Ashley told them Mr. Macri had said to him. If your Honor, please, Mr. Macri has never been interrogated about that.

The Court: Well, as I understand it, you're talking about the conversation up at Coeur d'Alene?

Mr. Holman: Yes.

The Court: Mr. Ashley was asked if he didn't make certain statements, by way of impeachment. He denied that he made them, and now the witnesses have testified he did make the statements. It doesn't seem to me that opens the door for either side to go into whether his statements were true or false. That was only for impeachment purposes.

Mr. Holman: That's all right, your Honor.

The Court: Is there anything else?

Mr. Holman: I have nothing, your Honor.

The Court: Do you have anything further, Mr. Hawkins?

Mr. Hawkins: No, nothing further.

The Court: Mr. Ivy?

Mr. Ivy: No, sir. [2431]

The Clerk: Before both parties rest I have four more exhibits I'd like to call to counsel's attention.

Mr. Holman: Your Honor, before the case is concluded, I'd like to re-offer Macri's identification



72, the blank form for bid bond, and I have no supporting evidence other than what occurred here in court, plus Mr. Schaefer's answers.

The Court: What is that?

Mr. Holman: That is the form of application by the Glen Falls Indemnity Company.

Mr. Olson: I have the same objection, your Honor, I've made each of the other three or four times that application has been offered.

The Court: The offer will be denied.

Mr. Holman: Then there was another identification, 120, your Honor, my own notes in my office in conference with Mr. Schaefer and the gentlemen who accompanied him on January 23, 1945.

The Court: That was offered and rejected once, wasn't it?

Mr. Holman: Yes.

The Court: Same ruling.

Mr. Holman: That's rejected, your Honor?

The Court: Yes. I assume you're still objecting?

Mr. Olson: My objections are the same, your Honor, [2432] that I made previously.

Mr. Holman: I'd like again to re-offer with respect to 1068 the field notes of the witness Black throughout the performance of that job, being Macri's identification 80.

The Court: Those are the field notes that Mr. Black, the engineer on 1068, made. For what purpose are they offered?

Mr. Holman: For the purpose of showing the progress of the job, and thereby supporting the

charges made against Mr. Schaefer and the Concrete Construction Company in the cross-complaint.

The Court: How do they sustain charges against Mr. Schaefer? This was after the work was started by Mr. Macri, and during its progress by Mr. Macri.

Mr. Holman: It's just a progress report, your Honor.

The Court: While the work was being done by——

Mr. Holman: Macri; yes, your Honor.

The Court: How would that affect whether or not Mr. Schaefer breached the contract?

Mr. Holman: I have this in mind, your Honor; much the same as a tenant abandoning a house.

The Court: As what?

Mr. Holman: As a tenant abandoning a house under [2433] a lease; the landlord is under obligation not to overload the condition, but to use his best efforts to avoid a loss to the opposite party, if possible, and that's what I had in mind this would show.

The Court: Well, you've shown what it cost you; there's no contradictory evidence on that. This doesn't go into the proof of the cost of your operation.

Mr. Holman: No, your Honor. It does show when the forms were set and what equipment was on and when concrete was placed in them, and its progress, and when it was completed.

Mr. Olson: Your Honor, I make the same objection I made previously. The document is self-serving, it is hearsay, absolutely no opportunity to

cross-examine concerning the contents of the document. He's offering it for the purpose of proving the contents of a written document made by one of their field force to their office. It is not competent evidence.

Mr. Holman: May it please the Court, there was every opportunity to cross-examine while Mr. Black was on the stand.

The Court: It wasn't offered while he was here, was it?

Mr. Holman: I think so; wasn't that offered while Mr. Black was here? [2434]

Mr. Olson: I don't know. My position is that even if it was——

The Court: It was rejected just yesterday.

Mr. Olson: Yes, it was.

The Court: That was the first time I recall.

Mr. Holman: It was identified at the time.

The Court: Well, I don't care about that, particularly. I'll sustain the objection. I don't believe it is material here.

Mr. Holman: Well, I'll withdraw it, your Honor, since it is part of our record, then.

The Court: All right.

The Clerk: I have a copy of 127 made up.

Mr. Holman: May the copy be marked 127 and I return to Mr. Olson the original, your Honor.

The Clerk: The same is true of Macri's 128.

Mr. Holman: And the same for that, your Honor; a copy has been made.

The Clerk: Macri's 14, which is part of the Bureau file, I have a copy made up of that.

Mr. Holman: This is the monthly estimates, complete. I'd like to have the copies substituted, your Honor, so that the originals can be returned.

The Court: That may be done.

The Clerk: The same is true of Macri's 20 on 1068. [2435]

Mr. Holman: The same thing, your Honor; it is the copy prepared by the clerk in lieu of the original.

The Clerk: And on 17-a, b and c; a is an exhibit, b and c are identifications which were rejected. That's made up out of this identification 17.

The Court: Did you have anything else, then, Mr. La Framboise?

The Clerk: Yes, sir, that's all of Mr. Holman's, I believe.

The Court: How about these files where the individual bills and vouchers were just identified and not offered in evidence? Are you withdrawing them?

Mr. Holman: No, I wanted to cover those, your Honor. I have had these marked and available for counsel throughout the case since production at their request, and I now offer each of these and the sub-numbers in evidence, namely Macri's 106 to 115, inclusive, with the request that the sub-numbers be marked by the Clerk as the basic supporting data for the compilation of the claim on 1068, specification 1068, and also Macri's 116, your Honor, the OPA regulation, price control, title 32.

The Court: Let's see; perhaps we had better take these one at a time and give Mr. Olson a chance to object [2436] or consent.



Mr. Olson: If your Honor please, I can make my objection to these as a group, Macri's identifications 106, 107, 108, 109, 110, 111, 112, 113, 114 and 115. All of these identifications are objected to on the ground that they have not been properly identified, that they're irrelevant and incompetent to prove any claim against the use plaintiff, M. C. Schaefer, or the Concrete Construction Company. They contain numerous notations written on in pencil, some of them in pen; I believe they are purely self-serving documents. They were used in cross-examination for the purpose of interrogating Miss Callahan as to the documents from which she made up Exhibit 91, and if these are offered, as I assume they are, of proof that that cost actually went into 1068, I submit they are not properly identified and not admissible for that purpose.

The Court: I don't see the advantage of propriety of encumbering the record with all of this detailed evidence. I thought that one of the reasons for offering Macri's 91, which was the summary made by Miss Callahan, was that the individual records on which it was based were voluminous and complex, and it wasn't practical to offer them in evidence directly, and therefore a summary would be received, providing the originals were available [2437] for counsel's examination and cross-examination, and now we're demonstrating that there wasn't any real reason for putting in this summary.

Mr. Holman: I don't differ from that position, but I still feel that it is my duty as part of Mr. Macri's case to make at least the offer.

The Court: Well, they've been here at all times, of course.

Mr. Holman: That's the point.

The Court: My conception of this is that the supporting data has been available, and counsel could have introduced or offered them if he chose to do so.

Mr. Holman: And he not doing so, I'll offer them.

The Court: Well, I'll sustain the objection.

Mr. Olson: I would like to have the record show that I do not object to their being in evidence for the sole purpose of showing that they are the documents from which the compilation, Exhibit 91, was made. For that purpose I would join counsel's offer, but as proof of their contents, it is that to which I do strenuously object, unless counsel is offering them for that limited purpose.

Mr. Holman: You can't blow hot and cold on them, your Honor.

Mr. Olson: No, I'm not blowing hot and cold.

Mr. Holman: I mean I can't; you can.

The Court: I'd be inclined to sustain an objection merely because of their voluminousness and encumbering the files, when a summary is in evidence showing at least a recapitulation of all their pertinent part.

Mr. Holman: Is that your Honor's ruling?

The Court: Yes.

Mr. Holman: I then make application to withdraw them for our permanent files.

Mr. Olson: I resist it, your Honor. I would like to have them available for use in argument.

The Court: Well, they have to be in or not in, it seems to me.

Mr. Olson: Well, I offer them for the restricted purpose, not as to their contents, but simply as showing the documents from which Exhibit 91 was prepared.

Mr. Holman: I offer them for all purposes.

The Court: They will be admitted in connection with 91, the testimony of Miss Callahan with reference to the cost of 1068.

Mr. Holman: And to avoid the very arduous duty of giving them sub-numbers, if I may again entrust them to the custody of the clerk with the request that they be not dis-assembled, it will save me a lot of work. [2439]

Mr. Olson: I take it counsel's admonition goes to both tables?

Mr. Holman: Everybody except you and me and Mr. Hawkins and Mr. Ivy.

Mr. Olson: How about the Clerk?

Mr. Holman: Don't be facetious.

The Court: Well, I think they can be put in as they are, and the clerk can give them sub-numbers. Some of them have already been marked, haven't they?

(Whereupon, defendant Macri's Exhibits for identification numbered 106 to 115, inclusive, were admitted in evidence.)

Mr. Holman: I'd like, then, to offer in amplification of Miss Callahan's testimony, Macri's identification 116, being an Office of Price Administration issue under Title 32 of part 1399, Construction, Oil Field, Mining, and related machinery, regulation 134 with respect to prices.

The Court: Do you have any objection?

Mr. Olson: I have no objection to it going in in connection with Miss Callahan's testimony. I don't know about the amplification.

The Court: It will be admitted in connection with her testimony.

(Whereupon, defendant Macri's Exhibit No. 116 for identification was admitted in evidence.)

Mr. Holman: Your Honor, I am confronted with a copy which came through counsel Hawkins, or rather through Mr. Goerig, to counsel Hawkins and through him into the possession of the Clerk, of what is headed "War Contract Hardship Claim for Macri and Company, Seattle, Washington" upon which Mr. Macri has been interrogated upon the stand, and I find it neither marked for identification or otherwise in this case.

Mr. Hawkins: We're not offering it in evidence, your Honor. It is in the first place a copy of a copy, a rather tenuous authenticity; then, too, I find the claim isn't exactly what I expected it to be.

The Court: Who does it belong to?

Mr. Hawkins: It belongs to anybody who wants it. The copy from which it was prepared belonged to Mr. Macri's other attorneys.



The Court: Has it been marked for identification?

Mr. Hawkins: No, it's never been marked or offered.

The Court: Then there is nothing for us to do.

Mr. Holman: Only this; the record I am sure shows rather stringent cross-examination by Mr. Hawkins with respect to this being prosecuted, and there was a long delay——

Mr. Hawkins: There was no long delay. It's been [2441] in the hands of the clerk since about the 27th of February.

The Court: That was in the prior cases, the first day we started?

Mr. Hawkins: That's right.

Mr. Holman: The only concern I have, if counsel Hawkins now will make the statement that so far as these two cases are concerned it is not competent or pertinent, that is all I'm interested in.

Mr. Hawkins: That's all right; I'm not offering it.

Mr. Holman: May it be marked for identification, to show what the ruling is, or what shall we do with it?

The Court: Well, it has never been marked. The record may show it was here in court, and that no one chose to offer it.

Mr. Holman: I think I'll return it to Mr. Hawkins.

The Clerk: Now on Mr. Olson. Plaintiff's identifications 52, 53, and subdivisions of 53, a to h, inclusive, have not been offered, but were produced here in court and marked for identifications.

Mr. Olson: Your Honor, these two exhibits I think were in the same category as some of those last ones. These two identifications were put in for the [2442] purpose of examination of counsel if he wished to do so in connection with certain graphs which we put in, but I will for the purpose of the record offer plaintiff's identification 52 and all of plaintiff's identifications 53, including all of the sub-identifications.

The Court: Do you have an objection?

Mr. Holman: No objection, your Honor.

The Court: I question again that all of those things should go in here. We've got a record that's going to be tremendously voluminous, and, of course, I suppose you don't have to take up any more of this than you want to on appeal.

Mr. Hawkins: Well, I'll make an objection. I haven't really examined those documents, I don't know what's in them, but I do know that there is a certain amount of self-serving statements in there, so I'll interpose an objection on those.

The Court: The objection will be sustained. We seem to have difficulty getting an objection here. It was quite the reverse at the beginning of the trial.

Mr. Olson: I'm really surprised that Mr. Holman would consent that these notations on the superintendents' reports could go in. They are really quite good. May we withdraw, then, identification 52 and 53 with all of those subdivisions?

The Court: Yes, they may be withdrawn.

Mr. Olson: I have not offered, I believe plaintiff's identification 119, which is the monthly cost

statements of Mr. Schaefer addressed to Mr. Macri, and those statements were the ones that were referred to in the letter to which your Honor has already sustained an objection.

Mr. Holman: I do object to these, your Honor, as having been affirmatively shown by the witness Schaefer himself as not having been sent currently, and having been transmitted to his attorney, Mr. McKelvey.

The Court: Let me see that. I think I know what it is. Yes, I'll sustain an objection to this 119.

Mr. Olson: Now on plaintiff's identification 83, I was under the impression that I had offered that and it had been rejected. If the record does not show it, I'll re-offer plaintiff's 83, which is a written statement of James A. Black, offered in connection with our cross-examination of James A. Black when he was called as a witness for the defendants.

Mr. Holman: My notes of that show that it was offered, and as I understood, it was rejected because your Honor rules it was not inconsistent with Mr. Black's testimony and therefore it would not be competent evidence.

The Court: It seems to me I did rule on that.

The Clerk: My note is that it wasn't offered, and Mr. Olson refused to offer it, and suggested to Mr. Holman that he offer it, so that he could cross-examine without offering it.

The Court: Well, let's see; you called Mr. Black, didn't you?

Mr. Olson: I called Mr. Black.

The Court: And then Mr. Holman asked for this statement, and it was produced. I don't believe this was ever used for impeaching purposes. I'll sustain the objection to it.

Mr. Olson: We offer in evidence, your Honor, plaintiff's identification 118, being a letter of Mr. McKelvey to Mr. Tom Holman, indicating the transmission to Mr. Holman of a claim of some sort of the Concrete Construction Company against Mr. Macri.

Mr. Holman: You haven't the claim attached.

Mr. Olson: No, I have not. That letter was handed to me out of your file.

Mr. Holman: Well, there is no question I got the letter, your Honor; I recognize it, and I got it out of my file and handed it to counsel. It refers to a statement attached. I think that's already been covered between counsel and me, that it is one of these two statements, one pertaining to \$35,000.00 worth of [2445] claim, and the other one raised to about \$45,000.00. I'm referring to exhibit 68.

Mr. Olson: You were of the opinion that 68 was the one; now, I don't know what it was.

Mr. Holman: I don't know whether it has any probative force, your Honor.

The Court: It doesn't seem to me that without the statement to which it refers it would be of any probative value, unless you wish to show some sort of claim was made on the 9th of March.

Mr. Olson: That's the only thing I can see it is worth.

The Court: Well, it will be admitted for what it is worth.



(Whereupon, plaintiff's Exhibit No. 118 for identification was admitted in evidence.)

Mr. Olson: If we haven't already done so, we rest, your Honor.

(Discussion about time for argument.)

Mr. Holman: Your Honor, in advance of argument, I would like to renew the motions at the end of the case that I had at the beginning of the case, namely, I would move at this time that the plaintiff's complaint in chief be dismissed and he recover nothing on that ground, and for the reason that there is a failure to comply with [2446] the requirements of the sub-contract, 1062-1, exhibit number 5, wherein it is required that there must be written notice given of any claim for delays within the period fixed by that instrument, and the proof affirmatively shows that that was not done. The next motion I wish to make is that the plaintiff recover nothing either in the case in chief or in the cross-complaint—or, pardon me—either on his claim for damages in specification 1062 or 1068, on the ground and for the reason that there has not been a compliance with the laws of the State of Washington, which would govern in this Court, and this District, requiring the filing of a certificate of assumed trade name in advance of commencement of trial, and on that your Honor will recall that the record is at present showing an amendment to the pleadings that the certificate was filed after the case commenced, and a correct filing was denied by all the parties adverse to the plaintiff. I have those two motions.

The Court: The motions will be denied.

Mr. Hawkins: For the purpose of the record the defendants Goerig and Philp challenge the sufficiency of the evidence and move the court for an order granting a non-suit as to plaintiff's case, the case of M. C. Schaefer, doing business as the Concrete Construction [2447] Company, with respect to specification 1062, and also plaintiff's case with respect to 1068. We also join in counsel's motion for a dismissal for the reason that the plaintiff has not shown compliance with the trade name statute of the State of Washington.

The Court: The motions will be denied.

Mr. Hawkins: Oh, we also move that Macri and Company's cross-complaint against Goerig and Philp and the Continental Casualty Company's cross-complaint against Goerig and Philp be dismissed for failure of proof.

Mr. Ivy: I desire to renew the motion on behalf of the Continental Casualty Company for dismissal of them from the action, and challenge the sufficiency of the evidence, and ask that the case be dismissed as to the Continental Casualty Company.

The Court: The motions will be denied. It seems to me that it would be impossible under the state of the record here for the Court to make any final adjudication as to the application, if I might call it that, of Mr. Macri for judgment against Goerig and Philp. That controversy isn't fully presented here, as I see it, at the present state of the record.

Mr. Holman: Not the complete loss on the job is not presented, no. [2448]

The Court: Not the complete loss on accounting, because as between Goerig and Philp and Mr. Macri under the termination agreement Goerig and Philp agree to pay a certain proportion of Mr. Macri's losses, when they're determined, and of course the loss hasn't been shown on either 1068 or 1062 so far as Macri is concerned. There isn't any question about that?

Mr. Holman: Nor could it be shown without determination of these actions.

The Court: No; it will require a separate accounting, so the controversy is largely between Mr. Schaefer and the other defendants here.

Mr. Hawkins: I think that's correct. I think there probably will be an issue between ourselves and the bonding company, but I don't think it will take more than five minutes to state our facts on that. You see, the bonding company has asked judgment against Goerig and Philp.

The Court: Yes, I appreciate that.

(Whereupon, counsel Olson presented his final argument to the court.

(Whereupon, the Court took a recess in this cause until Friday, March 21, 1947, at 9:00 o'clock a.m.)

Yakima, Washington, Friday, March 21, 1947,  
9:00 o'Clock A.M.

(Whereupon, all counsel presented their  
final arguments to the Court.)

### Court's Opinion

The Court: Mr. Olson, I think I might save time here by announcing the Court's views, and then I'll give you an opportunity to be heard on those points on which my ruling is adverse to you or your client, Mr. Schaefer.

I necessarily will have to deal with these issues generally, and what I am trying to do is to lay some reasonable basis for the drafting of the findings of fact and conclusions and the various judgments that will have to be entered.

Taking up first Mr. Schaefer's suit against Mr. Macri on sub-contract 1062, the arrangement there was that Mr. Schaefer was to construct the concrete structures in place, furnishing certain materials that were listed in the sub-contract. Mr. Macri agreed to furnish the form lumber and to do the excavation work. The specifications that are in evidence here pertain, or do not contemplate, I should say, any sub-contracting of a part of this work. They naturally pertain to the work of the general contractor under his contract with the government, and they provide that the government will pay for excavations in those instances where clearance is required in the excavations, the removal of common earth one foot out from [2451] the



base of the concrete structure and on a slope of one to one. The government naturally was concerned wholly with the matter of payment, because since they required only that these structures be built and installed according to specifications in the places specified by them, it didn't make any difference to them how much excavation the general contractor might make or might not make. All they required of him was that he put in the concrete according to their requirements, but here we have a dividing of the work, not, certainly, directly contemplated by the specifications, where the contractor is to do the excavating, and the sub-contractor is to build and install the forms and pour the concrete.

In that case there would be an implication, certainly, that the excavation was to be done in such a way as to afford reasonable clearance, a reasonable opportunity for the sub-contractor to properly and efficiently and without undue expense put his forms in the excavation and carry out his part of the work.

It is the view of the court that the pay provisions of the specifications as to clearance and slope are not absolute requirements. I do not believe that they obligated Mr. Macri to cut the banks to a slope of one to one in those instances, as I have said, where clearance was required, where a form had to be placed between the concrete and the bank, but I think that they are very persuasive as to what would be [2452] reasonable. The Reclamation Bureau, with its long experience in construc-

tion of this kind, I assume wouldn't pay for more excavation of more dirt than was reasonably necessary for the contractor to install his form, so I think the best evidence we have, the best indication we have, as to what was reasonably required is the fact that the Reclamation Bureau would pay for dirt excavated one foot out at the base and on a slope of one to one.

The evidence is overwhelming that excavation was not made in that manner. It was made, the Court finds, approximately one foot out from the base, with practically vertical banks; that is, with only the slope that would naturally result from the excavation by the use of Macri's hoe type shovel. A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macri's superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and that's not at the base, it was at the surface, so there was no effort on Mr. Macri's part to excavate out one foot, and it seems to me equally obvious, aside from the testimony in [2453] the case, that that was not reasonable and proper clearance in the structure and form. We have in evidence here there are between the concrete and the outer

bank the ship-lap, which I assume would be approximately an inch thick, less whatever is planed down, the two by fours forming the framework, and then what's been referred to, I think, as the strong-backs, an additional two by four there, which makes approximately nine inches of form outside of the concrete, so that a foot would give only an additional clearance of three inches, which obviously isn't sufficient regardless of the manner of operation of this so-called she-bolt or clamp, or whatever it may be; and the court finds that the excavation was not done in a manner to give sufficient clearance, that there was not sufficient slope, there was not sufficient width in the excavations to enable the sub-contractor to efficiently and properly install his forms, and that he was delayed and hindered in the progress of the work, and that his carpenters installing the forms had to make extra excavation, and that this was the rule rather than the exception in the progress of the work.

In that connection, I find also that the fine grading was not done according to the layout plans and specifications, that it was defectively and improperly done, and that in most instances the carpenters had to do the fine grading before they could install the forms, and that that also increased [2454] the amount of work Mr. Schaefer had to do, and hindered his progress and interfered with his progress of the work.

I also find that the excavations were not made on time and in an orderly sequence and manner, so

as to unable the sub-contractor to proceed as he should have been able to do with prompt progress of the work.

Now, with reference to the lumber which Mr. Macri was to furnish under the sub-contract, I find on the evidence here that sufficient lumber was not furnished; it was not furnished on time, and the quality was not proper and suitable for the work intended. It is true, I think, that there was some lumber there most if not all of the time during the progress of the work, but much of the time there was missing some essential type of lumber, such as the two by fours or the ship-lap or some particular kind of lumber or plywood required, so that the work was hindered and delayed because of the lumber not being promptly furnished, not furnished in sufficient quantity, and not furnished in the quality that was the minimum requirement, I should say, for work of this kind.

I make that finding despite Macri's identification 104, because I think Miss Callahan testified that she had been told what bills to put in here; she made up that exhibit from the invoices that had been sent in by people furnishing lumber. She didn't know whether the lumber went on the job or not, and took the invoices at the direction of somebody [2455] else, and then Mr. Klug testified that that was the kind of lumber that could have been used on this job; my recollection of the testimony is that he didn't say that this particular lumber was used, but it was the kind that could have been used on the job, and I think Mr. Klug



on the stand tried to minimize the situation with reference to the shortage of lumber. I think his statement more clearly represents the fact that there was a shortage of lumber, as he said in his statement.

In short, the court finds that Mr. Macri breached the sub-contract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer.

I think that the conversations between Mr. Macri and Mr. Schaefer were substantially as testified by Mr. Schaefer and his witnesses. I think that on these occasions mentioned Mr. Schaefer complained, and in that connection Mr. Schaefer complained, he or his men complained, repeatedly and frequently to Mr. Macri and to Mr. Macri's agents on the job, and Mr. Macri [2546] had notice of these complaints. He had notice and knowledge of his failure and his agents' failure to perform the contract according to its terms; that he accepted and acted upon oral complaints and notices to that effect; that he knew of the condition, and that he waived any and all requirements as to written notice contained in the contract, by his conduct.

Coming back to those conversations, it is the view of the Court that Mr. Schaefer did complain, and stated that he would pull off the job, or in effect, that if conditions weren't improved, and that Mr. Macri on several occasions promised that he would do better, and that he would see that things were done in accordance with the requirements of the contract, or in a proper manner, and that he did tell Mr. Schaefer substantially as Schaefer and his witnesses testified, that if he would go on and complete the contract, he wouldn't lose anything on the contract, nobody had ever lost on his contracts, and that he would make it right and pay him for what he might lose under the adverse conditions created.

However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and [2457] with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct

isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.

However, I think that Mr. Macri did by his representations induce Mr. Schaefer to go on, by his promises that the bad conditions would be remedied. I think that Mr. Schaefer did go on by reason of these representations, and performed this work, which was accepted by Mr. Macri and which went into the job, and that under the circumstances it would be extremely inequitable for Mr. Schaefer not to be paid the fair and reasonable value of his services. In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach.

Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, *United States vs. John A. Johnson and Sons*, [2458] 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration. This act, which the courts have

said numerous times should be liberally construed, because of evidences and intent on the part of Congress that all persons furnishing labor and materials that go into public contract work should be fairly and reasonably compensated for their services, is very closely analogous to the public improvement statutes of the State, and as I read the cases, while there is none that is squarely in point with this one in its facts, the implication of the decisions of the Washington State Supreme Court and the language employed indicates that that court subscribes to rules similar to that applied in *Susi vs. Zara*, that where the contract is breached by the main contractor, the sub-contractor is then entitled to the fair and reasonable value of his services rendered in performance of the work, and that that includes an appreciation of the amount necessary to spend by reason of the breach, including delay occasioned by the main contractor.

The *Susi* case, as has been pointed out, is not squarely in point here, perhaps because there the contract was never [2459] completed by the sub-contractor, and the question was not decided as to whether the sub-contractor in recovering the fair and reasonable value of his services could go entirely beyond the total amount of the bid price provided in the sub-contract. In the *Susi* case, the main contractor took over the contract when it was partly performed, and made it impossible for the sub-contractor to complete it, and the court held that the sub-contractor could recover for the reason-



able value of the work and services performed up to that time, and was not bound by the unit prices of the contract, and could recover against the bonding company. I think the thing that makes the Susi case applicable here was that here we have a continuing breach. There was a completion of performance, it is true, but there was a breach right up to the last day of the work, by Mr. Macri; there continued to be a breach, and therefore I think the principle of the Susi case would apply.

Mr. Schaefer, electing to perform in the face of the breach by the main contractor, was entitled to the fair and reasonable value of the work, and since the recovery is not for damages for contract, but for the fair and reasonable value of the services, I think under the decisions of the State court that Mr. Olson cited here and were cited in his brief, that the sub-contractor is entitled to recover on that basis against the bonding company also. [2460]

The case that hasn't been cited here, and is very closely analogous to this one as to facts, McDonald vs. Supple, an Oregon case, 190 Pacific 315, I think deserves attention. It is, of course, only persuasive, as the Pennsylvania Federal District Court case is persuasive, not controlling, but it appeals to me as being equitable, and squares fairly well with what the Supreme Court of the State of Washington I think has indicated as its view in cases of this character. In McDonald vs. Supple there was a government contract to construct dredges by the sub-contractor, parts and materials to be furnished

by the main contractor. The sub-contractor brought suit on the theory that there had been an oral modification of the written contract. The lower court held that there had not been an express modification of the written contract by oral agreement. The plaintiff then amended, alleging that there had been an implied modification by implied agreement, to pay the fair and reasonable value of the work done and required to be done by reason of the breach of contract on the part of the main contractor.

The court held first that there was no inconsistency between an allegation of an expressed oral modification and an allegation of an implied contract to pay the fair and reasonable value, and overruled a demurrer to the amended complaint. The court also sustained recovery on the basis of the fair and reasonable value of the services, and the amount [2461] and value of the work to be done by the sub-contractor was greatly increased in that case because of circumstances closely analogous with those in this case, that is, that the materials to be furnished by the contractor were not furnished in time, nor in an orderly manner; they were defective; the sub-contractor had to have a large crew of skilled workmen standing by; they couldn't work efficiently because of the breach of the contract on the part of the main contractor. The court on page 317 of the opinion states:

“The amended complaint averred, and the testimony on behalf of the plaintiff tended to show the defaults on the part of the defendant

Supple in the performance of the original contract were so numerous and so vital that they caused the plaintiff Wakefield to perform his labor under different conditions, at a different time, and in a different manner than contemplated or agreed upon by the parties in the original writing, and so much more burdensome and difficult than was originally agreed upon that plaintiff Wakefield was not required to accept the compensation fixed in the original contract as the measure of his recovery, but by reason of the important changes in the work to be done, and the defaults on the part of defendant Supple in his performance of the contract, plaintiff is entitled to recover in addition to the contract price, such a sum as would reasonably compensate him for the services performed by him and accepted by the defendant."

And again on page 318:

"The testimony on behalf of the plaintiff tended to establish such changes in the work caused by the failure of the defendant to perform his part of the contract which made the labor more burdensome and extended the same to two or three times the amount it would ordinarily have been if the material had been delivered at the time and in the condition agreed upon. Therefore the plaintiff could properly recover on quantum meruit."

(Cases cited.)

This paragraph is also rather interesting; it throws light on one of the controversies in this case, continuing on the same page:

“Under the contract Wakefield was entitled to partial payments as the work progressed, and he submitted various statements to defendant with such object in view, and accepted money under such estimates. It was not contemplated that such advance payments should be a final settlement of any part of the work, and the contention of defendant that plaintiff is thereby estopped from claiming additional compensation cannot be maintained. The evidence tended to show that in different conversations between Wakefield and Supple, the latter told Wakefield in effect to go ahead and do the work, and Supple would make it all right with him when he got through.”

Now, as I say, of course that case isn't controlling; it is merely persuasive, but it appeals to the court as appropriate, and not, certainly, in conflict with the announced decisions of the Supreme Court of the State of Washington. Now, I should say too, of course, that the bonding company was not involved in the Supple case, but it seems to me that it logically follows that if recovery is allowed on quantum meruit, that is, for the fair and reasonable value of the services that go into the work, that it isn't damages, as was held in the Pennsylvania case, but is for work and services that entered into the work, and that the bonding company should be held to compensate for the work and services.



Certainly the rule is that a bonding company which has a performance bond for a main contractor is not bound, to its detriment, by the provisions of the sub-contract as to the price of the work to be performed. If a general contractor makes a sub-contract to do a part of the work for twice its reasonable value, the bonding company isn't bound by that contract, and conversely, it seems to me they should not be able to claim the price in the sub-contract to their benefit, where the reasonable value of the work and services under the [2464] circumstances that they were actually performed exceed the contract price.

Now, that brings us to the question of the amount which Mr. Schaefer is entitled to recover. The plaintiff's exhibit 63, which is the plaintiff's statement of costs on this work, I think forms a fair basis for determining the amount of recovery. However, I'll say at the outset that it is the view of the court that plaintiff is not entitled to recovery of interest prior to the entry of judgment. It seems to me that this is an unliquidated claim. It necessarily must be so. If Mr. Schaefer is entitled to recover only for the fair value of his services, it required and would require testimony as to the amount and value of those services, so that they could not be liquidated until that evidence is received and passed upon by the court, so that the view of the court is he's not entitled to interest prior to the date of judgment. \$57,618.87, and from that I think should be deducted the legal expense of \$533.57, and the engineering expense of \$201.25.

I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should, because it is a part of the fair and reasonable value of this work. A carpenter doesn't just go out by himself and build forms, or the workman pour concrete. He does it under the direction and aid of an established [2465] business organization, and all of the expenses of that organization, including general overhead, go into the work. The item of profit is another troublesome one. However, as I recall, in the Denny Regrade case a profit of fifteen per cent was allowed there on one of the extra items, to Vigilante, I believe it was, on the transporting of the dirt to the place where it was dumped in Elliott Bay. At any rate, I'm inclined to allow \$57,618.87, less the two items mentioned, for engineering services and legal expense.

The bonding company is entitled to judgment back against Macri for the amount and costs and a reasonable attorney fee. It is difficult to make a compromise or adjustment between what should be paid for a long, drawn-out case of this magnitude, with the amount involved, and some consideration for what the traffic should be required to bear in the way of the burden imposed upon the losing parties here. I am inclined to think that while it would not be adequate under other circumstances, that fifteen hundred dollars would not be unfair or out of the way. Have you any suggestion on that, Mr. Ivy? I would welcome a suggestion if you wish to make it, before I definitely fix an attorney fee.

Mr. Ivy: Your Honor, in my brief I left it to the discretion of the court.

The Court: Yes, I know you did. Well, that's the amount the court determines. Now, we come to the question of [2466] whether the bonding company can recover judgment back against Goerig and Philp. I'm inclined to think they can. I haven't my notes here. I find myself somewhat in the position of a man who gets chlorine gas. He drowns in his own secretion. I'm almost at that point with my notes I have taken. I haven't my notes here, but I have a general statement of the law as to dormant and silent partners. This joint venture creates a situation that I think we can, for the purpose of this case, say is analogous to a partnership. Once you establish joint venture, about the only difference between it and a partnership is the difference in the scope of the two as to what business and activity is covered, but here we have a situation analogous to that of a partnership, in which two of the partners, Goerig and Philp, are dormant or silent partners, and the statement of the law which I have in mind is from *Corpus Juris*, to the effect that the liability of a dormant partner prior to dissolution of the partnership, on any contracts entered into by one authorized to do so for the partnership, and within the scope of the business, the liability of a dormant or silent partner does not depend upon knowledge of the third person to the contract or dealing with the same, of the existence or relationship of the silent partner; that it depends upon the silent partners being parties

to the authorized contracts of the partnership, and further based upon a consideration of public policy because it would open the door wide to chicanery and fraud if people were permitted to make secret agreements as to their liabilities which they could change at will to the detriment of third persons, so that the liability does not depend upon the fact that the person dealing with a firm knows of the existence of a silent partner and depends upon his credit.

If the partnership enters into an authorized contract during the existence of the partnership, the silent partners then become members of that partnership, or become parties to that contract, the same as if they had personally signed it, and are bound until they are released in a way by which parties can ordinarily be released from their contracts, and here I consider it immaterial that as to 1062 the bond application was actually signed prior to the execution of the joint venture, because I think a partnership may adopt, as this one expressly did, may adopt prior contracts of one of the parties just as they may be bound by subsequent contracts, and I think here under the circumstances and the wording of this joint venture, that the parties did expressly or by implication adopt the contract of Mr. Maceri with the government on 1062, and with the bonding company on the application for the bond on 1062, and of course, the bonding company having once been bound continued to be bound. Its obligation was fixed and determined, and what remained then [2468] was to just ascertain the



extent of the liability of the bonding company, in the light of subsequent events. The bonding company couldn't release itself once it had executed the bond, and therefore I think Goerig and Philp became bound under the indemnity contract, indemnity against loss, contained in the application executed by Mr. Macri.

As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important. I don't think they are, because it is a quasi-contract arising after the contract terminating the joint venture. That contract, still carrying the analogy of the partnership, I think dissolved the partnership; it terminated it, brought it to an end. The only thing remaining then was a contract that Goerig and Philp would reimburse Macri under certain circumstances, for a portion of his losses, and I don't believe Goerig and Philp should be liable for any contract entered into in the name of this joint venture, or by Mr. Macri operating for it, subsequent to the date of the agreement terminating the joint venture, and as I view the theory of this case, and the theory upon which I decide it, that contract, quasi or implied [2469] contract, arose out of conduct that was subsequent to the termination agreement.

I am announcing these things, Mr. Olson, as I stated at the outset, with the understanding that in any points where my decision is adverse to your client, you will have an opportunity to be heard before my ruling becomes final. I thought it might save time if I just announced what I had in mind here.

Mr. Olson: It undoubtedly has, your Honor.

The Court: Is there anything that I've overlooked here, between one party and the other?

Mr. Holman: I call your Honor's attention to the fact that Macri affirmatively pleaded——

The Court: Oh, yes, 1068, you mean?

Mr. Holman: Oh, no; Macri affirmatively pleaded and proved the levy by the United States arresting any funds in the hands of Macri that might then be due to Mr. Schaefer, and Mr. Schaefer admitted on the stand that that had not been paid, so I think that's an issue here and we're entitled to that protection.

The Court: Well, it isn't directly before the Court here. This court can't decide now whether Mr. Schaefer owes the government ten thousand dollars, or whatever it may be, or whether he doesn't owe them. This notice of levy is in the nature of or might be analogous to a writ of garnishment [2470] against you.

Mr. Holman: Yes, your Honor, and we've pleaded that, and Mr. Schaefer has admitted the obligation is still due, and it's not been denied.

Mr. Olson: Mr. Schaefer said he had not paid that to the government, that's all.

The Court: But he hasn't admitted liability on it, as I understand it. Well, it seems to me about the only thing I can do here is to provide that any action to enforce collection of this judgment as to Mr. Macri, to the extent of the amount shown in this, shall be stayed until determination of this controversy.

Mr. Holman: That's my idea.

The Court: That will protect your client from the payment of that part of the judgment, and when I asked if I had overlooked anything, I meant as to 1062. I haven't, of course, got to 1068 yet.

Mr. Ivy: One matter I wasn't clear about in 1062. You made a statement that the bonding company would only be liable for the fair and reasonable value of the services under quantum meruit that had been allowed against the principal contractor, but not in excess, I understood, of the contract. You were discussing the amount of the value, the extent of the contract.

The Court: No, I didn't intend to make any such statement [2471] as that. I'm glad you called it to my attention, because I had overlooked saying that the court finds that the fair and reasonable value of the work and services performed and materials furnished by Mr. Schaefer in the prosecution of the work contemplated by specifications 1062 is the amount shown in his exhibit 63, plaintiff's exhibit 63, with the exceptions noted of interest and attorney fees and engineering service. The court finds that is the fair and reasonable value of the work and services performed under the cir-

cumstances created and existing by Mr. Macri's breach. Now, as to 1068, the court finds that there was a breach of that contract by Mr. Macri.

Mr. Olson: I hesitate to interrupt, but that item of fifty seven thousand, that's after, of course, there has been credited on the——

The Court: I see what you have in mind. I didn't mean to use that particular item. I'm glad you called that to my attention. The court finds that the fair and reasonable value of the work and services are as stated in this exhibit, prior to the application of the amount paid, with the exceptions I have noted already.

As to 1068, the court finds the defendant Macri breached that contract; at the time he called upon Mr. Schaefer to perform, there were no excavations there, and even up to the time he gave notice he was taking it over, there had never [2472] been any excavations fine graded and ready to receive forms. It would have been impossible for Mr. Schaefer, and was impossible, for him to comply with the demand that he proceed with 1068. However, under the circumstances existing here, the court is of the view that the showing of damages by way of loss of prospective profits is too speculative and uncertain and vague to warrant a recovery on the part of Mr. Schaefer. It's true that there is evidence as to what this work could have been done for, but looking at it broadly, the court must recognize Mr. Schaefer had lost a lot of money on one contract; he was still engaged in that contract under an arrangement where he had to continue regardless of the difficulties encountered; his equipment



was tied up, and continued to be until about March or April, 1945, I believe, and under the circumstances it doesn't seem to me that there's a showing here that Mr. Schaefer could have arranged for, bought or rented additional equipment, could have come on here and made a profit on this work, assuming, and I'm not too sure about that, that prospective profits could be recovered in a case of this kind.

The judgment of the court will be, therefore, subject to hearing counsel on the matter, that Mr. Schaefer should recover one dollar nominal damages against Macri only on 1068. Now, if you wish to be heard, Mr. Olson, I think you have some time left. [2473]

(Argument by Mr. Olson)

The Court: Well, I know it is a close and difficult question, but I'm still of the view that there wasn't a substantial beginning of the performance of this contract until about the 31st of July, as I remember, or the first of August, when they started pouring concrete, and while the conduct of Mr. Schaefer, or Mr. Macri, I mean, would relate back to those conversations, I don't regard any one of them as of final and controlling importance. I think the conversations, taken with the continuing breach by Mr. Macri, and his conduct, gave rise to a situation where Mr. Schafer was entitled to compensation for the fair and reasonable value of his services, and the services were rendered after the termination agreement. I know it's close, but I'm still of that opinion. My statement, by the way,

that there hadn't been substantial performance by Mr. Schaefer, I didn't mean to say that Mr. Schaefer didn't do everything he could up to that time in the way of preparation in the light of the breach by the other party. I just wanted to make that clear.

I might say that I always try to keep my mind fixed so it can be changed on occasion, and I shall go over these briefs that have been submitted. I haven't had sufficient time to properly digest Mr. Ivy's brief, although he went into it to some extent in his argument, and I just received Mr. Holman's last brief, and I'll go over these, and I don't want [2474] to re-hash this whole thing over again. I'll consider all of these points, and if I come to some different conclusion in whole or in part, will advise counsel prior to the time that the findings and judgment are entered. [2475]

#### Reporter's Certificate

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington.

That the above and foregoing, consisting of four volumes with pages numbered consecutively from 1 to 592 (exclusive of this page) contains a full, true and accurate transcript of the testimony of M. C. Schaefer, Allyn R. Hunter, and Lawrence E. Bufton, and of the Court's oral opinion, including all objections and the court's ruling thereon.

Dated this 24th day of July, 1947. [2476]

\* \* \* \* \*

That the above and foregoing, consisting of one volume with pages numbered consecutively from 594 to 799, (exclusive of this page) contains a full, true, and accurate transcript of the testimony of William E. Schaefer, Fred Waltie, and L. R. Hendershott, including all objections and the court's ruling thereon.

Dated this 30th day of July, 1947. [2477]

\* \* \* \* \*

That the above and foregoing, consisting of eight volumes with pages numbered consecutively from 1 to 1555 (exclusive of this page) contains a full, true and accurate transcript of all of the proceedings in said trial as ordered by counsel, and when considered in conjunction with the transcript previously prepared and filed in this cause consisting of typed pages 1 to 799 inclusive, constitutes a full, true, complete and accurate transcript of all proceedings in said cause, including all objections and the Court's ruling thereon.

Dated this 25th day of October, 1947. [2478]

/s/ STANLEY D. TAYLOR,  
Official Court Reporter.

## DEPOSITION OF CLYDE PHILP

## CLYDE PHILP

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

## Direct Examination

By Mr. Holman:

Q. Will you give your name, please?

A. Clyde Philp.

Q. You live where, Mr. Philp?

A. At 2933 - Second Avenue, Seattle, Washington.

Q. Are you willing, Mr. Philp, that this deposition which is being taken may be transcribed without your reading the completed copy and without your signature thereto under the Federal Rule?

A. Yes.

Q. So you waive that, do you?           A. Yes.

Q. In the records?           A. Yes.

Q. What is your relationship—contractual relationship with respect to the Roza Work performed by Macri & Company involved in this action, being Bureau of Reclamation, Department of Interior, contract 12r14996, including specification No. 1068 for performance of earth work, pipe line, structures, laterals, sub-laterals, Roza Division, Yakima Project, Washington, according to the terms and specifications contained in said contract and particularly in accordance with specification 1068 and with respect to Bureau of Reclamation, Department of Interior Contract No. 12r14825 for earth work, pipe lines and structures, laterals 5.3 and 69.8 and sub-laterals, Roza Division, Yakima Project,



(Deposition of Clyde Philp.)

Washington, with specifications No. 1602, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specification 1062. Is that question clear, Mr. Philp?      A. I believe it is. [2479]

Q. All right, what is your answer?

A. Whatever contractual obligation, if any, is contained in the agreement entered into between Macri & Company and Goerig and Philp in July, 1944.

Mr. Holman: Counsel Brown, I call for the production of that.

Mr. Brown: I haven't the original of that.

Mr. Holman: All right. Maybe I can identify it.

Q. (By Mr. Holman): Is that the agreement contained in the answer and cross-complaint of the Defendants Macri as specified in the cross-complaint of the Defendants Macri as the one signed between you and them and a signed copy in your possession, Mr. Philp?

Mr. Brown: Here it is.

Mr. Holman: You have a copy?

Mr. Brown: Yes.

Mr. Holman: All right. I will have him identify it.

(Discussion off the record.)

Q. (By Mr. Holman): Your counsel has produced a copy of that agreement to which you referred?      A. That's right.

Mr. Holman: Will you mark it for identification, please?

(So marked.)

(Deposition of Clyde Philp.)

Mr. Brown: That is a copy of the contract that was served and filed under order of the Court as a part of the bill of particulars.

Q. (By Mr. Holman): Mr. Philp, I hand you Defendants' and Cross-Complainants' Exhibit 1 for identification, marked in your deposition today, consisting of five typewritten pages, numbered 1 to 5, inclusive; that is the instrument to which you refer, in view of your Counsel's stipulation, is it?

A. That's right.

Q. Now is it or is it not a fact that by reference to the contents of this identification 1, there is incorporated by reference an agreement [2480] between Sam Macri, Joe Macri and Don Macri, co-partners doing business as Sam Macri & Company, as first party, and A. J. Goerig, an individual, as second party and Clyde Philp, an individual, as third party, referring to the above contract No. 12r-14825, specification 1062, and also the additional agreement of December 11, 1943, referring to earth work, pipe lines and structures, laterals 70-1 to 80-1 and sub-lateral, East Turbine Laterals, station 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington?

A. There is mention made of those two in the agreement of July 15, 1944.

Q. And those prior agreements were executed between the parties that I have indicated, including yourself?

A. That's right.

(Deposition of Clyde Philp.)

Q. Is there any other written agreement or any other writing in any other manner affecting the two latter agreements that I have called your attention to, other than the one you have identified as Defendants' and Cross-Complainants' Exhibit 1 for identification? A. Not to my knowledge.

Mr. Holman: I call on Counsel Brown to produce any such if they are now available.

Mr. Brown: Any such——?

Mr. Holman: Other than this.

Mr. Brown: As far as I know there is nothing else in writing.

Q. (By Mr. Holman): Then it is a fact, is it not, Mr. Philp, that the two agreements of December, 1943, to which I have directed your attention, and Defendants' identification 1, is the total written contractual relationship between you and the Defendants and Cross-Complainants Macri with respect to these jobs that I have indicated?

A. I believe that is right.

Q. What was the relationship between you and the Defendant and Cross-Complainant, A. J. Goerig, at the time of execution of the instruments I have previously indicated to you in December, 1943?

A. We were partners on some jobs——

Q. I am speaking with respect to these jobs.

A. We each had an individual interest in this job.

Q. As indicated by those——

A. As indicated by the joint venture agreement signed December 11, 1943.

(Deposition of Clyde Philp.)

Q. What if any money have you, Clyde Philp, paid into the performance of the two Federal Projects I have indicated in the previous questions?

A. I would not know until there is a full accounting on the Stadium Home Project.

Q. It is a fact, is it not, that with respect to the Stadium Home Project there was an additional joint venture agreement? A. That's right.

Q. Between the same parties as I read before, that is, Macri as the first party and Goerig as the second and you the third? A. That's right.

Q. Is it a fact that except for contributions, if any, from the Stadium Home Project, there has been no contribution of cash or funds by you or by Goerig to your knowledge to the projects that I have indicated? A. That is correct.

Q. What if any equipment was furnished by you for performance of any of the work of the Roza Projects that I have indicated?

A. A 1942 G.M.C. Pick-up truck.

Q. Will you indicate with respect to that, Mr. Philp, the ownership, the manner of delivery for work on this job and the time it was on the job?

A. The truck was owned by Mr. Goerig and myself. I am unable to give the exact time without referring to the records on the length of time it was on said job.

Mr. Holman: I call on Counsel to produce the record with respect to that pick-up truck.

Mr. Brown: I have no record. [2482]

Mr. Holman: I call on Counsel Brown to supplement the deposition by such a document duly



(Deposition of Clyde Philp.)

verified by the party, to be filed supplementing this deposition. Could that be done, Mr. Philp?

The Witness: Well, off the record.

(Discussion off the record.)

Mr. Holman: Now I will ask Counsel Brown if he will do his best in cooperation with his client to furnish that information.

Mr. Brown: Yes, I will do that.

Q. (By Mr. Holman): Do you know the rental for that truck, Mr. Philp?

A. Not without referring to the records.

Q. Nor the time it was there?

A. Not at this time.

Q. And does that include the naked truck or the truck and driver?

A. It includes the truck only.

Q. And was that before or after O.P.A. maximum rental regulations, do you remember?

A. It was after the O.P.A. regulations.

Q. Can you tell me whether or not that conformed to those regulations, if you know?

A. They naturally would.

Q. You think they did, is that right?

A. I believe they did.

Q. That is the only item, Mr. Philp?

A. To the best of my knowledge.

Q. No materials furnished of any kind?

A. None that I know of.

Mr. Holman: I return the witness to you, Mr. Brown.

Mr. Brown: I have no questions.

(Deposition of Clyde Philp.)

Mr. Holman: That is all, Mr. Philp, unless you gentlemen want to ask some questions. [2483]

(Discussion off the record.)

Mr. Holman: What is the position of the Defendant Schaefer with respect to the deposition being taken; do they join with the Defendants Macri in the taking of the deposition or not?

Mr. Olson: No.

Mr. Holman: Do you wish now to take Mr. Philps' deposition?

Mr. Olson: We would be merely cross-examining. That I understand is a right we have as parties in the case.

Mr. Brown: I have no objection to cross-examination.

Mr. Holman: I haven't either. I wanted the record clear.

(Discussion off the record.)

Mr. Olson: We have no questions.

Mr. Holman: Mr. Brown, as Counsel for the Defendant and Cross-complainant, A. J. Goerig, do you now stipulate into the record that Mr. Goerig's testimony would be the same as that as given by Mr. Philp—if Mr. Goerig were here?

Mr. Brown: Yes.

Mr. Holman: That is all.

(Witness excused.)

Mr. Holman: For the purpose of the record, Mr. Brown, I am not offering Defendants' identification 1. I don't know whether you want to offer it or not.

(Deposition of Clyde Philp.)

Mr. Brown: Yes, I will offer it and will have it attached to the deposition.

Mr. Holman: There is no objection on the part of the Defendants Macri.

(Agreement terminating joint venture offered in evidence as Defendant and Cross-Complainant's Exhibit 1, the same being attached hereto and returned herewith.)

[Endorsed] Filed Feb. 24, 1947. [2484]

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In the District Court of the United States for the  
Eastern District of Washington, Southern Division

Civil No. 246

TH5 UNITED STATES OF AMERICA for  
the use of M. C. SCHAEFER, an individual  
doing business as CONCRETE CONSTRUCTION COMPANY,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP, individuals  
and copartners doing business as Macri Company, and CONTINENTAL CASUALTY  
COMPANY, a corporation,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be it remember, that on the 21st day of February, 1947, the above entitled cause came regularly

on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the plaintiff not appearing; the defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Bretthorst, Holman, Fowler and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; the defendant Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvey, Henke, Evenson & Uhlmann, of Seattle, Washington, and the following proceedings were had: [2485]

\* \* \* \* \*

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.



The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

\* \* \* \* \*

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness. [2486]

A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here? A. Yes.

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

(Testimony of A. J. Goerig.)

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying [2487] is the same bank all the time, your Honor, Seattle First National Bank.

A. Oh, it was—I couldn't say; it was over a year ago, I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

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Mr. Hawkins: Mr. Goerig, will you take the stand, please?

A. J. GOERIG

recalled as a witness in his [2488] own behalf, resumed the stand and testified further as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what is in his hands, for the purpose of the record. How is the appellate court going to know?

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburgh and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you? [2489] A. Yes.

(Testimony of A. J. Goerig.)

Mr. Holman: That I have no objection to. I move the rest of it be stricken.

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably a true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as copartners transacting business under the name of Goerig and Philp, and as copartners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburgh, and in the writ of garnishment and complaint they are shown to be doing business as the Rovon Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I [2490] don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.



(Testimony of A. J. Goerig.)

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really the owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross complaint in this action, and it is offered for that purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the [2491] best evidence; it is not competent evidence.

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

(Testimony of A. J. Goerig.)

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third party creditors, that is, the plaintiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore [2492] it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

(Testimony of A. J. Goerig.)

Direct Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did

Q. Did you have anything to do with those jobs?

A. No.

Q. Did Mr. Philp have anything to do with those jobs? A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No. [2493]

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs? A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with those jobs?

A. The Macri Company.

Q. That is—— A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

(Testimony of A. J. Goerig.)

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to plaintiff's C, D, E, F, G, H, I, J, and K?

A. No, I never saw any of them.

Q. Your answer was no? A. No.

Q. That they were never called to your attention. Where [2494] did you and Mr. Philp maintain your office at the time these jobs were in progress? A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office? A. Yes.

Q. Where was that located?

A. Down off Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

### Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by plaintiff's exhibits A and B on to the completion of those jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the materialmen,



(Testimony of A. J. Goerig.)

laborers, or otherwise on those jobs that you had terminated the exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the materialmen or the plaintiffs in this case ever knew [2495] about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

Witness: No.

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond signed by Macri and Company?

obligation for the performance of those jobs, to be

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it. [2496]

(Testimony of A. J. Goerig.)

Mr. Holman: May I re-state the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by Plaintiff's exhibits A and B required and would have to have surety bonds?

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

Q. A current matter at the time you signed defendant's exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the [2497] objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him

(Testimony of A. J. Goerig.)

by leading questions anyway. If you wish to open up your direct examination I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

\* \* \* \* \*

(The following stipulation was entered on February 25, 1947, during the trial of cause No. 246, and while the witness R. M. Moorhead was testifying on behalf of the defendants Macri.)

Mr. Hawkins: Will the record also show the objection as to Goerig and Philp? I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

## Reporter's Certificate

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21 and February 25, 1947.

That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig occurring on February 21, 1947, and a stipulation occurring on February 25, 1947, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,  
Official Court Reporter.



[Title of District Court and Cause.]

Certificate of Clerk to Designation of Record on  
Appeal of Continental Casualty Company; M. C.  
Schaefer; Goerig and Philp

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages, consisting of three (3) volumes, numbered 1 to 881, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellant and Appellee, Continental Casualty Company, by the designation of record on appeal filed by counsel for the Appellee, M. C. Schaefer, and by the designation of record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same remains on file and of record in my office, and that the same constitutes the record on appeal of said Appellees and Appellants aforementioned, from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify that included in the transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants and Appellees, except Plaintiff's exhibits 1, 3, 5, 12, 22, 23, 24, 25, 26, 29, 44, 49, 51, 60, 61 and 63, Defendants Macri's exhibit 7, and Defendant Continental Casualty Company's exhibit 10. Said original exhibits are being transmitted pursuant to order of the District Court exhibits 12, 22, 23, 24, 25, 26, 29, 44, 49, 51 and 60, being sent under separate cover.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of record on appeal of the Appellant and Appellee Continental Casualty Company, amount to \$63.30, and the same has been paid in full by Eugene D. Ivy, attorney for said Appellant and Appellee.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of record on appeal of the Appellee, M. C. Schaefer, amount to \$20.70, and the same has been paid in full by Harry L. Olson, of attorneys for said Appellee.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of record on appeal of the

Appellants, A. J. Goerig and Clyde Philp, amount to \$6.30, and the same has been paid in full by Kenneth C. Hawkins, of attorneys for said Appellants.

In Witness Whereof, I Have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 11th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

[Title of Tax Court and Cause.]

Certificate of Clerk to Designation of Record on  
Appeal of Sam Macri, Don Macri and Joe Macri,  
and Continental Casualty Company

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages, consisting of five (5) volumes, numbered 1 to 1625, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, Sam Macri, Don Macri, and Joe Macri, and by the designation of record on appeal filed by counsel for the Appellant and Appellee, Continental Casualty Company, as the same remains on file and of record in my office, and that the same constitutes the Supplemental Record on Appeal of said Appellants and Appellees aforementioned, from the Judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify that included in the supplemental transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants and Appellees, except Plaintiff's Exhibits 4,



6, 41, 42, 43, 45, 46, 47, 48, 64, 70, 90, 123 and 129; Defendants, Macri's, Exhibits 15-a, 34, 35, 50, 50-a, 67, 74, 77, 78, 81, 82, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 and 116; Defendants, Goerig and Philp's, Exhibit 122; and Identifications 72 and 120; which are original exhibits and are being transmitted pursuant to order of the District Court. Said original exhibits and copies are being sent under separate cover.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of Record on Appeal of the Appellants, Sam Macri, Don Macri and Joe Macri, amount to \$162.40, and the same has been paid in full by Tom W. Holman, of attorneys for said Appellants.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in the Designation of Record on Appeal of the Appellants and Appellees, Continental Casualty Company, amount to \$0.50, and the same has been paid in full by Eugene D. Ivy, attorney for said Appellants and Appellees.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 5th day of November, 1947.

[Seal]

A. A LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11707

CONTINENTAL CASUALTY COMPANY, a corporation,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the  
use of M. C. SCHAEFER, an individual doing  
business as CONCRETE CONSTRUCTION  
COMPANY,

Plaintiff and Appellee.

A. J. GOERIG and CLYDE PHILP, individuals  
and copartners,

Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and copartners,

Defendants.

### APPELLANT'S STATEMENT OF POINTS

Comes Now the defendant and appellant herein,  
Continental Casualty Company, a corporation, and  
pursuant to Rule 19 of the above entitled court

states that it will rely upon the following points in the prosecution of its appeal from the judgment herein:

1. The United States District Court erred in rendering judgment in favor of the plaintiff and against this defendant, for the reasons that the surety on a contractors payment bond, such as this defendant, is not legally liable for damages for breach of the principal contractor Macri Company in the performance of its sub-contract with the plaintiff, and there was no evidence presented segregating the items of the plaintiff's expense within and without the said sub-contract.

2. The Court erred in concluding and holding as a matter of law that under the Miller Act the surety on the contractor's payment bond is legally liable for payment of compensation to a sub-contractor on quantum meruit for labor and material furnished and the reasonable value of the work done necessitated by breach of the sub-contract by the principal contractor by delaying the job or improperly performing the same or failing to do the things required under the said sub-contract, and the court erred in rendering judgment in favor of the plaintiff against this defendant upon that basis.

3. The Court erred in denying this defendant's motion for new trial for the same reasons.

4. The Court erred in failing and refusing to hold that any amounts recoverable by the plaintiff

from the defendant Macris in excess of \$2,656.46 was without the scope of the said sub-contract and therefore not recoverable against the surety, Continental Casualty Company.

/s/ EUGENE D. IVY,

/s/ ELWOOD HUTCHESON,

Attorneys for Appellant Continental Casualty Company.

Service accepted and copy received of the foregoing Appellant's Statement of Points and Designation of Record this 14th day of August, 1947.

OLSON & PALMER,

Attorneys for use plaintiff,  
M. C. Schaefer,

BROWN & HAWKINS,

Attorneys for cross appellants, Goerig and Philp.

[Endorsed]: Filed Aug. 15, 1947.



[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF POINTS ON APPEAL

Come now the appellants A. J. Goerig and Clyde Philp and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as errors all such matters and all adverse rulings.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for cross - appellants, Goerig and Philp.

Service Accepted and Copy Received of the foregoing Adoption of Points on Appeal this 2nd day of September, 1947.

/s/ HARRY L. OLSON,

/s/ FRED C. PALMER,

Attorneys for Appellee M. C. Schaefer.

/s/ EUGENE D. IVY,

Attorney for Appellant Continental Casualty Company.

Copy of the within Adoption of Points on Appeal served on defendants Macris by mailing a true copy thereof to Brethorst, Holman, Fowler & Dewar, 1710 Hoge Building, Seattle, Washington, on September 2, 1947.

/s/ KENNETH C. HAWKINS,

Of Brown & Hawkins, attorneys for cross - appellants, Goerig and Philp.

[Endorsed]: Filed Sept. 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL OF  
APPELLANTS SAM MACRI, DON MACRI  
AND JOE MACRI

Come Now the appellants Sam Macri, Don Macri and Joe Macri and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as error all such matters and all adverse rulings.

/s/ S. W. BRETHORST,  
/s/ TOM W. HOLMAN,  
/s/ THOMAS N. FOWLER,  
/s/ WARREN L. DEWAR,

Attorneys for Appellants Sam  
Macri, Don Macri and Joe  
Macri.

[Endorsed]: Filed Nov. 6, 1947.

IN THE  
**United States Circuit Court  
of Appeals**  
**FOR THE NINTH CIRCUIT**

CONTINENTAL CASUALTY COMPANY, a  
corporation,

*Defendant and Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, for  
the use of M. C. SCHAEFER, an individual  
doing business as CONCRETE CON-  
STRUCTION COMPANY,

*Plaintiff and Appellee,*

A. J. GOERIG and CLYDE PHILP, indi-  
viduals and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE MACRI,  
individuals and co-partners,

*Defendants and Cross Appellants,*

No. 11707

BRIEF OF APPELLANT  
CONTINENTAL CASUALTY COMPANY

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

EUGENE D. IVY  
ELWOOD HUTCHESON  
*Attorneys for Appellant*  
Miller Building  
Yakima, Washington

FILED  
APR 2 1 1948





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## JURISDICTION

This action was commenced in the federal district court under the Miller Act, U.S.C.A. title 40, sec. 270a, 270b; 49 Stat. 793, 794. It is expressly so stated in appellee Schaefer's amended complaint, and the jurisdiction of said court was expressly based thereon. (R. 2, 10). The district court so found. (95, 97, 104).

(All numerical references herein, unless otherwise indicated, are to the pages of the printed transcript of record herein. All italics are ours).

This is an action by a subcontractor to recover an alleged balance for services in the construction of a federal irrigation project, the defendants being the principal contractors, their partners or joint adventurers, and their surety.

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law or in equity. U.S.C.A. title 28, sec. 225. Final judgment was entered in the district court on May 1, 1947. (112-115). Notice of appeal therefrom was filed on May 20, 1947. (118).

## STATEMENT OF THE CASE

Where the principal contractors on a federal irrigation construction project breach the terms of a subcontract by them to be performed, so that the subcontractor's performance thereof is thereby delayed and rendered more difficult and expensive, and the subcontractor sustains damages by reason thereof, and the full agreed contract price has been paid to the subcontractor, and the same admittedly represents the full reasonable value of the services in performing said subcontract, were it not for such breach by the principal contractors, is the surety on the principal contractors' statutory payment bond liable to the subcontractor for damages for such breach of contract in a suit brought on a *quantum meruit* theory to recover the alleged reasonable value of the services performed?

That is the principal question involved on this appeal. The district court answered in the affirmative, in the erroneous belief that such is the state law in Washington and that the state law in such an action in the federal district court under the Miller Act is controlling. Appellant denies both of these propositions and contends that the said question should be definitely answered in the negative, and the action should be dismissed as to the surety.

This is an action brought by the appellee, the United States, for the use of M. C. Schaefer, doing business

as Concrete Construction Company, the subcontractor, against the appellants, Sam Macri, Don Macri and Joe Macri, doing business as Macri Company, the principal contractors, and A. J. Goerig and Clyde Philp, a co-partnership doing business as Goerig and Philp, Macri's silent partners and joint adventurers, and Continental Casualty Company, a corporation, their surety, to recover for certain losses sustained in the construction of earthwork and structures on certain laterals and sublaterals of the federal irrigation project known as the Roza Division, Yakima Project, near Yakima, Washington.

The use plaintiff, hereinafter referred to as appellee or Schaefer, sued to recover the sum of \$57,618.87 as the alleged unpaid balance of the reasonable value of the work, labor and expenses on the theory of *quantum meruit* after alleged breach of the subcontract by Macri Company, the principal contractors, hereinafter referred to as Macri. (12).

The case was tried to the court without a jury, plaintiff's demand for jury having been waived. The court rendered a lengthy oral decision, (2208), made findings, (94), denied defendants' motions for judgment and for new trial, (115-117) and entered judgment in favor of the plaintiff in the sum of \$56,764.97, together with interest at the rate of 6% from May 1, 1947, and costs in the sum of \$921.70, against the defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners doing business as Macri

Company, and the Continental Casualty Company, a corporation, and each of them. (112).

This is an appeal of the defendant surety, Continental Casualty Company, from said judgment. (118). Thereafter defendants Goerig and Philp cross-appealed from the judgment which allowed this appellant to have judgment over against them. (114, 129). A considerable time after the taking of our appeal and the ordering of the record therefor, the defendants Macri also cross-appealed and ordered the remainder of the record. (136). See decision of this court, March 31, 1948, upon motion to dismiss Macri appeal.

Of course obviously if the action is dismissed on the appeal of Macri Company, it must be likewise dismissed on our appeal. It is elementary that the liability of a surety can never be greater than that of the principal.

Without repeating the same herein, we therefore rely upon the contentions made and authorities cited in the brief of appellant Macri Company herein. However, without waiving those contentions and without making any admissions as to the facts, we shall in this brief assume for the sake of the legal argument that the facts are in accordance with the contentions of the appellee Schaefer's evidence and the district court's findings of fact (94) as follows:

On December 7, 1943, appellant Macri Company entered



into a contract with the United States, No. 12r-14825 for earthwork, pipe lines and structures, laterals 59.3 to 69.8 and sublaterals, Roza Division, Yakima Project, Washington, for a total contract price of \$128,550.95. (Pltf. Ex. 1; 96, 158, 172).

(The same was referred to in this record as contract or specifications No. 1062. Much evidence was introduced as to contract No. 1068 between the same parties, but the same is not involved on this appeal).

The work under the contract consisted of excavation work and thereafter the construction of numerous concrete structures.

On the same date appellant Macri Company as principal and this appellant Continental Casualty Company as surety executed a statutory "payment bond" to the United States as obligee in the sum of \$64,275.48 pursuant to the said Miller Act of August 24, 1935, conditioned as follows:

*"Pursuant to the act of Congress approved August 24, 1935. . . .*

*"Now, therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived,*

then this obligation to be void; otherwise to remain in full force and virtue." (Pltf. Ex. 1; 96, 158, 172).

This bond was written pursuant to Macri's written "application for bond," wherein the Macri partners agreed to indemnify this appellant against any loss thereunder and agreed to pay its reasonable attorneys' fees, costs and expenses. (Casualty Co. Ex. 10; 98, 105, 158, 172).

On December 11, 1943, Macri Company and Goerig and Philp entered into a written "joint venture agreement" whereby they agreed to divide the profits, if any, derived from said government contract, and each of them agreed to pay the losses and liabilities, if any, incurred thereunder. (Macri Ex. 7; 97, 98, 158, 176). Said joint venture agreement specifically ratified and adopted for and on behalf of said joint venture the bond and application for bond executed four days previously. (98).

The work to be done is described more fully in Specifications No. 1062 issued by the government. (Pltf. Ex. 3; 158, 174).

On March 14, 1944, Macri Company as principal contractor and Schaefer doing business as Concrete Construction Company as subcontractor entered into a subcontract whereby Schaefer agreed:

"To furnish all labor, and necessary equipment to do all the concrete work, formwork, cut, bend and install all reinforcing steel, all such work as shown on the

Plans and as specified in the Specifications No. 1062, Contract No. 12r-14825, Roza Division, Yakima Project, Washington. Subcontractor shall strip and clean all concrete forms, remove nails from same and pile same in neat piles, after concrete has been poured in accordance with Plans, Specifications and Government Inspection and has had the proper time to set up. Forms at completion to be the property of the General Contractor. . . .

“All materials except form wire, nails and curing material will be furnished by General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing material. . . .

“That, subject at all times to the due performance by the Subcontractor of his agreements hereunder, the Principal Contractor shall pay the Subcontractor for the work as follows:

1: The total sum of Twenty Six & 00/100 Dollars per cubic yard of concrete installed  
Dollars (\$26.00), in current funds at Yakima, Washington. . . .

“For the purpose of fixing the amount of said payments the value of work done for which payment is made shall be computed according to estimates made, determined and allowed by the Principal Contractor. . . .

“5. If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, or by fire, earthquake, Act of God, war, strikes, picketing or boycott not occasioned by any act of neglect of the Subcontractor, unavoidable delays of a common carrier solely due to accidents affecting the delivery of materials, or by abandonment of work by employees through no fault of the Subcontractor, then the time herein

fixed for completion of the work shall be extended for a period equivalent to the time lost by any or all of the reasons aforesaid; provided, however, that no such extension of time shall be made or allowed *unless the Subcontractor shall give the Principal Contractor notice, in writing, within five days after the occurrence of any such act, omission or event, specifying the fact and cause of delay. . . .*

“Any damage for which the Subcontractor may be liable hereunder, because of, or resulting from delay, shall not be mitigated or reduced because of the fact that such delay was caused by any act, omission or event hereinabove in this paragraph mentioned, *unless the notice above required is given by the Subcontractor to the Principal Contractor.*” (Pltf. Ex. 5; 99, 158, 175).

*No such written notice was ever given by appellee. No notice was ever given to appellant surety of Macri's alleged breach of contract.*

It is undisputed that the total agreed contract price under said subcontract at the agreed rate of \$26.00 per cubic yard of concrete installed, based upon the total yardage of concrete as allowed by the government engineers, was \$35,271.12. Prior to suit Macri paid Schaefer \$32,614.66. It is so stipulated in the pre-trial order. (78, 104). This leaves an unpaid balance of the contract price of only \$2656.46. (124,2258).

Appellee's claim is actually composed of two parts:

(1) Compensation for doing what was not included in the concrete work to be done by appellee under the



subcontract, but which on the contrary under the subcontract and the principal contract, were to be performed by Macri, the principal contractor, and

(2) For additional costs and expenses incurred by appellee in performing his own work under the subcontract by reason of delay thereof due to breach of contract by Macri in not having proper excavation or earth work and fine grading timely completed, form lumber of suitable quality available, etc.

Appellee has made no attempt to segregate his claim as between these two categories. He admits that he cannot do so. He admits that from day to day his men were spending a large part of their time doing the things which Macri should have done under the contract.

It is our contention that, manifestly, both of these claims or categories constitute damages for breach of contract on the part of Macri. Neither of them is work required to be done by appellee under the subcontract. Both are outside of the subcontract.

Appellee's voluminous evidence as to the alleged breaches of the subcontract by Macri are briefly summarized as follows in paragraphs 12, 13 and 14 of the district court's findings of fact:

"That it was the obligation of the defendants Macri Company to do the excavation in such a way as to afford reasonable clearance and a reasonable oppor-

tunity for the subcontractor to properly and efficiently carry out its part of the work, and that the clearance reasonably required where a form had to be placed between the concrete and the bank required an excavation of 1 foot out at the base of the excavation from the outside wall of the concrete structure to be installed and a slope of one to one on the bank; that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient width in the excavation to enable the subcontractor to efficiently and properly construct his forms and that he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of the work.

"That the defendants Macri and Company failed to do the fine grading in accordance with the lay-out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work.

"That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work.

"That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality was

not proper and suitable for the work intended; that much of the time there was missing some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind.

“That the defendants Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was willful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company’s part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff.” (100-102).

From time to time Schaefer made oral complaints to Macri, and Macri promised to do better, but according to appellee’s evidence did not do so. (102-3).

The foregoing alleged breaches of the subcontract were denied by Macri and his witnesses, but without admitting the same, we shall assume herein for the sake of the legal argument that Macri breached the subcontract in said respects.

Each of the foregoing acts, if true, constitute a breach of the subcontract on the part of Macri. Appellee’s evidence also showed that Macri’s said breaches of the subcontract rendered performance thereof more difficult and

expensive for appellee through delaying and otherwise hindering his work and increasing the amount of work to be done by him in order to complete the job.

Appellee's evidence, if true, shows that in this manner he sustained substantial damages by reason of Macri's said breaches of the subcontract, in that the same was thereby rendered more difficult and expensive for appellee. Appellee, as we understand, concedes that the surety is not liable for damages for breach of the contract. He is attempting, however, to do indirectly what he admittedly cannot legally do directly, namely, recover damages from the surety for the breach of the subcontract on the ingenious theory of a *quantum meruit* recovery for the reasonable value of the services performed. He contends that the value of those services was far in excess of the agreed contract price, which (with a minor exception hereinabove stated) he has admittedly received, *by reason of such breaches* of the subcontract by Macri. *It is that excess for which he has recovered judgment against the surety herein.* The district court found that the reasonable value of the services performed was \$89,498.71, from which was deducted the agreed contract price paid in the sum of \$32,614.66, and entered judgment against appellant surety, as well as Macri, for the difference in the sum of \$56,764.97, plus interest and costs, the same being substantially the full amount sued for. ((104, 113; Pltf. Ex. 63).



*Appellee's evidence admittedly made no segregation of the items of expense incurred by him within and without the contract.*

It is also undisputed that appellee never gave Macri any written notice of any such breaches as required by the subcontract hereinabove quoted. (Art. 3, Par. 5, Pltf. Ex. 5; 175).

That appellee is actually seeking recovery of *damages* for Macri's alleged breach of contract is shown by the following statement of appellee's counsel in objecting to the introduction in evidence of a certain letter:

"My point is, it is wholly immaterial to whether we're *entitled to damages against Macri* or he's entitled to damages against us." (396).

Appellee on cross-examination admitted:

"Q. What were the things that you were requiring him to do in order for you to continue?

A. To change his method of excavation, and to do his own excavating instead of forcing it on us to do.

Q. *You then did a certain amount of excavating not required by the contract?*

A. *That's right.*

Q. *And you have the cost of that segregated, do you?*

A. No.

Q. Now, what other matters were you requiring Mr. Macri to do in order for you to stay?

A. For him to supply lumber, and to not only do the excavating according to specifications, but to get on with the excavation so we could make some progress in our work.

Q. You complained of his delay?

A. That's right.

Q. And what else, Mr. Schaefer?

A. Well, there was his general excavating, the hand excavating, and fine grading, the lumber, and the slowness of his progress in doing that work and supplying the lumber.

Q. *And those were all matters required of him under his contract and under the subcontract with you?*

A. *That's correct.*

Q. And are those the matters complained of in your first cause of action, Mr. Schaefer?

A. Yes.

Q. Making up the amount asked for in your first cause of action?

A. That's right." (406-7).

Appellee conceded that after April 29, 1944, the original written subcontract was abandoned and appellee was proceeding under a new oral contract:

"Q. Mr. Schaefer, after you had your conversation with

Macri in which you allege that an oral arrangement was made for extra compensation, *did you keep any separate track of the extra costs?*

A. Separating the costs?

Q. That's right.

A. No.

Q. *You have no means, then, of arriving at any figure that could be charged under your theory of the case to Mr. Macri under the so-called alleged oral contract?*

A. The oral agreement was that he was going to be paying all the costs. *There wasn't a dividing there between that which was contract and which was additional work, and you just couldn't possibly break down the number or give any definite proof that you were only going to be required to make, we'll say, 25 trips, or 20 trips, from the yard to the job site, and that the rest of the hauling of the forms would be from structure to structure, as compared with the number of trips required and that we would make from the shop to each structure out in the field and back to the shop again with forms for repair; it's just a physical impossibility.*

Q. Can you by date fix a time and place after which you assume that the original contract was abrogated and a new oral contract was substituted? . . . .

Witness: That was April 29 in the field, on job 1062, and again a verification of that on June 15. . . .

Q. Which date have you selected, Mr. Schaefer, June 15 or April 29?

A. Well, it was April 29, was the first agreement, and then the other was a verification of it.

Q. And your claim is an abandonment of the original contract after June 29—after April 29, is that correct?

A. My claim is that we had then an oral contract.

Q. You what?

A. I say, my claim is that we then had an oral contract." (1368-9-70).

Appellee further admitted:

Q. Mr. Schaefer, you made response to counsel that you couldn't submit a bill until the job was finished, for the additional cost. Will you please explain that?

A. How could I determine what my bill was to be until I was through with the job?

The Court: Well, answer the questions.

Mr. Olson: Mr. Schaefer, just answer the questions.

A. Well, I couldn't determine what my cost was until I was through with the job.

Q. *Then no detail at all was kept of any additional costs, is that correct?*

A. *No, we didn't keep the cost in that manner, no.*

Q. *You have no record, then, of any of the additional costs which you are stating that Mr. Macri caused you over and above your contract?*



A. We had a certain amount of segregation in our daily reports, but *there is so much of the work that you just couldn't segregate.*

Q. Was it a part of your agreement with Mr. Macri on April 29, and again spoken of on June 15, that no detail of additional cost would be submitted until the end of the job? . . . .

A. There was no such conversation, that is, there was no conversation on that point.

Q. There was no agreement on that point?

A. There was agreement that he was going to pay for all our additional cost and expense. He was going to pay for all our costs.

Q. *But you kept no record of the additional cost, is that correct?*

A. *Not as such, no. They weren't segregatable... You couldn't segregate them.*

The Court: . . . . I thought there was *no question here* at this stage of the trial that *there has been no effort to segregate the costs.* You make no claim of that, do you, Mr. Olson? I think your contention is that the oral contract entirely superseded the written contract, and that there was no occasion for a statement being made or rendered as to additional cost. Is that your position?

Mr. Olson: *That is our position with reference to the oral agreement, your Honor.*" (2154-5-6).

Appellee's expert witness Allyn R. Hunter, who also wrote a bond for appellee, testified that he was present at

a conversation when Macri is alleged to have stated that he would pay appellee's *additional costs and expenses* on this job. (930-1).

Hunter also testified that if Macri had not breached the subcontract, appellee could have completed the same within 75 working days, and that the delay therein caused by Macri's breach of contract would make appellee's cost of performance two or three times more than it would have otherwise been. (939-943).

The impossibility of segregating appellee's cost of performing the subcontract, if Macri had properly performed, and his cost of performing in view of Macri's alleged breach, was further conceded by appellee's counsel:

"Mr. Olson: Yes, but your Honor, the thing they are going on is that they want to segregate it, they want to take the contract price of so much and then place a separate and distinct value on those delays, and *that's not the theory of our case*. We're not limited to that, and they know, as we do, your Honor, that it is a physical and practical impossibility for anybody on this job to divide between the time it takes to put that form in how much of their time that they spent as carpenters in putting in the form if they hadn't been hampered by that bank, and how much of the time on each excavation was used up because of the bank being in the way, and the hole not being ready, so we go on this general testimony, your Honor, that had these things been done right, and I realize I'm using the word "right" loosely, but the Court understands me, that it could have been all done in four months, which, your Honor, wouldn't have carried this job over the winter, and it is by virtue of the fact

that instead of being able to do that we were held up thirteen months, I'm asking this witness if he can't evaluate within the confines of two or three times. If he can come that close to it, now, if the witness can, and he's an expert, if they can tear down his testimony on cross-examination, let them try. Counsel says he can evaluate that cost just as good as this witness can. Maybe he can, I can't. It seems to me it is proper to go into that for the purpose of substantiating in a general way what our costs were on this project." (949-50).

"Now, the statement I did make, your Honor, that it is impossible to take your contract and say that it covered for a certain amount of labor and materials, and to divide, structure by structure, the part of the services rendered that were rendered if the subcontract had been complied with by Mr. Macri and the amount of them that were the result of his non-compliance. . . . It is our position that by reason of his failure to perform this contract, that contract went out the window." (953).

*Appellee's witnesses conceded that the reasonable value of appellee's services in performing this subcontract, if Macri had properly performed the same, would not have exceeded the agreed price under the subcontract, namely, \$26.00 per cubic yard of concrete.*

Appellee's witness Hunter testified:

"At the time this job was estimated I worked up the figures myself on it, and had somewhere in the neighborhood of \$26.00 or \$27.00 as a final figure; that is excluding the aggregates and cement and lumber. . . .

Q. Is that, in your opinion, Mr. Hunter, *the fair and reasonable cost or value of these services referred to in my question?*

A. *It is.*

The Court: I assume that \$26.00 or \$27.00, was that a cubic yard of concrete? I just want to be clear on it.

A. Cubic yard." (960).

"Well, I think that *the bid which was made out by Mr. Schaefer, which I saw myself at the time the bid was made out, was ample.*" (958).

The same covers all of the items undertaken by appellee's subcontract. (962).

Appellee's expert witness Lawrence E. Bufton conceded that the reasonable value of appellee's services in performing the subcontract, if Macri had properly performed, was a little over \$27.00 per cubic yard of concrete, or substantially the amount of the agreed contract price. (1160-3).

Appellee's accountant, L. R. Hendershott, conceded:

"Q. Mr. Hendershott, in your examination of the original records *did you find any segregation made on the Concrete Construction Company's books that would indicate extra items charged over and above the contract.*

A. No, sir. *There is no segregation on the books.*" (1298-9).

The district court based the amount of appellee's recovery upon Pltf. Ex. 63 prepared by appellee's accountant,



L. R. Hendershott, which is an alleged summary of appellee's costs and expenses in the performance of this job, together with certain expenses in preparing for this litigation, and overhead and profit items. (1241-2, 1252-1264).

Pltf. Ex. 63 includes, and the court allowed recovery of 20 per cent for overhead expense, plus an additional 10 per cent for profit, shown by Hendershott's testimony:

"A. That's overhead expense. It was based on 20 per cent of the direct cost. That total is \$13,582.82.

Q. What relation does that figure have to \$68,447.66?

A. That represents 20 per cent of it." (1258).

"Q. Now your profit, 10 per cent, will you explain that figure?

A. That is 10 per cent of the total direct and indirect costs. The overhead is regarded as indirect cost. It is 10 per cent of the total of the direct and indirect costs; it amounts to \$8203.05.

Q. And that makes a total figure of how much?

A. \$90,233.53. . . .

Q. What is that figure supposed to indicate, as far as your examination?

A. That's the total costs, including profit, on the job.

Q. All right. Now, your payments received is your next item shown there. How much did the books and records show had been paid?

A. \$32,614.66." (1261).

The district court held that appellee could not recover on his first cause of action based on an alleged express oral agreement of Macri to pay extra costs, but only on his alternative second cause of action based on *quantum meruit*.

The district court in his opinion stated:

"In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. . . .

"However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express*

*contract that Mr. Macri was to pay for the fair value of the services. . . .*

*"Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, United States vs. John A. Johnson and Sons, 65 F. Supp. page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration." (2213-5).*

*"I had some difficulty coming to a conclusion as to whether general overhead should be included. I'm inclined to think that it should. . . .*

*"The item of profit is another troublesome one." (2222).*

The district court stated that the issue involved on this appeal is a close question, saying:

*"As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that it might very well be, because this is a close case, and these questions are close and in some respects novel ones; and if the appellate court should hold that the bonding company are not liable, then I think the question of whether Goerig and Philp are bound would be important." (2225).*

*"I know it is a close and difficult question." (2229).*

On July 15, 1944, while the work was still in progress, Macri Company and Goerig and Philp entered into a written agreement terminating their joint venture agreement

previously existing. (Macri Ex. 7; Goerig Ex. 9; 98, 158, 175, 1301, 2223-5, 2232-8). It is undisputed that no one else was notified of the termination of the joint venture agreement. (1301, 2248-9).

The Macri partners in their application to this appellant for the bond agreed in writing to indemnify appellant against any loss or liability and to pay appellant's costs, expenses and reasonable attorneys' fees. (Casualty Co. Ex. 10; 98, 158).

The district court denied all of appellant's motions, and entered judgment as above stated in favor of appellee, from which this appellant, and later Macri Company, have appealed. Goerig and Philp have cross-appealed from the judgment over entered by the court in favor of this appellant against Goerig and Philp as the partners or joint venturers of Macri Company.

#### SPECIFICATION OF ERRORS

The district court erred:

1. In denying the motion of this defendant-appellant, Continental Casualty Company, for dismissal as to it at the close of the plaintiff's evidence. (951-2, 1376-7).

2. In denying the motion of this appellant for dismissal as to it at the close of all of the evidence. (2206).

3. In making finding of fact No. 15, and particularly



in holding that there was any implied agreement or quasi-contract that appellee was to be paid the reasonable value of his work under the subcontract with the extra burdens imposed upon him by Macri Company's breach thereof, for the reason that the same is contrary to law and is not a legal or proper basis of liability of the contractor's surety, and the same is contrary to the evidence. (102-3).

4. In making finding of fact No. 16, and particularly in finding that appellee performed services of the reasonable value therein stated and that there is a balance owing as therein stated, for the reason that the same is contrary to the evidence and contrary to law as relating to this appellant surety. (103-4).

5. In making conclusion of law No. 1 that plaintiff should recover judgment against this appellant in the sum of \$56,764.97 and costs or any other sum, for the reason that the surety is not legally liable for more than the agreed contract price. (109-10).

6. In entering judgment in favor of appellee against this appellant in the sum of \$56,764.97 and interest and costs, or any other sum. (113).

7. In denying this appellant's motion for new trial. (115-7).

8. The court erred in refusing to dismiss the action as to this appellant, Continental Casualty Company.

9. The court erred in finding and holding that this appellant is liable as surety on the contractor's payment bond for the reasonable value of the work performed by appellee subcontractor in excess of the agreed contract price, for damages for breach of contract by the principal contract in performing the subcontract, either upon a quantum meruit theory or otherwise, especially where, as in this case, it is undisputed that no segregation was made of the cost of performing the subcontract as written and as actually performed, in other words, no segregation of the items of the subcontractor's expenses within and without the said subcontract.

10. The court erred in rendering judgment in favor of appellee and against this appellant for the reasons that the surety on a contractor's payment bond, such as this appellant, is not legally liable for damages for breach of the principal contractor Macri Company in the performance of its subcontract with appellee, and there was no evidence presented segregating the items of the appellee's expenses within and without the said subcontract.

11. The court erred in concluding and holding as a matter of law that under the Miller Act the surety on the contractor's payment bond is legally liable for payment of compensation to a subcontractor on quantum meruit for labor and material furnished and the reasonable value of the work done necessitated by breach of the subcontract

by the principal contractor by delaying the job or improperly performing the same or failing to do the things required under the said subcontract, and the court erred in rendering judgment in favor of the appellee against this appellant upon that basis.

12. The court erred in failing and refusing to hold that any amounts recoverable by appellee from appellant Macris in excess of \$2,656.46 was without the scope of the said subcontract and therefore not recoverable against the surety, Continental Casualty Company.

13. The court erred in concluding and holding that the law of the State of Washington governed and that under said law appellee is entitled to such recovery against this appellant.

14. The court erred in concluding and holding that this appellant is liable, among other things, for overhead expenses and alleged loss of profits of appellee. (2222).

## ARGUMENT

### 1. SUMMARY OF ARGUMENT

Our principal contentions herein may be briefly summarized as follows:

1. The federal law governs, rather than the law of the state of Washington. This is not a case of concur-

rent jurisdiction based on diversity of citizenship. Jurisdiction of the federal court herein is based solely and entirely upon the fact that this is an action under the Miller Act. (U.S.C.A., title 40, sec. 270 (a) and (b); 49 Stat. 793, 794). Jurisdiction is expressly based thereon in both appellee's amended complaint and the findings of the district court. (2, 10, 95, 97, 104).

This appeal involves a question of liability arising under a federal statute. As to such a question, of course, the decisions of the federal courts, rather than state courts, are controlling.

2. However, the law of the State of Washington supports rather than opposes our position herein. The Washington cases, considered as a whole, establish that the surety is not liable in such a case.

3. A surety on a federal construction project under the Miller Act is not liable for damages for breach of the subcontract by the principal contractor, either on the theory of quantum meruit for the reasonable value of services performed due to such breach of contract or otherwise, and particularly where as here there is admittedly no evidence of segregation of the items of expense within and without the original subcontract. This is merely an indirect means of the subcontractor recovering damages for breach of the subcontract by the prin-



cial contractor, which legally may not be done against the surety.

The court therefore erred in concluding and holding that the surety on the contractor's payment bond given pursuant to the Miller Act is legally liable for payment of compensation to a subcontractor on quantum meruit for labor and material furnished, for the reasonable value of the work done necessitated by breach of the subcontract by the principal contractor by delaying the job or improperly performing the same or failing to do the things required of him under the said subcontract.

The agreed contract price has been fully paid with the exception of the retained percentage in the sum of \$2656.46. Any amount recoverable by appellee from Macri in excess thereof was without the scope of the subcontract and therefore not recoverable against the surety.

The total agreed contract price under the subcontract was \$26.00 per cubic yard of concrete or a total of \$35,271.12. It was stipulated at the pre-trial hearing and is undisputed that of that sum practically all, namely, \$32,614.66, was paid by Macri to appellee prior to suit. (78).

4. In any event the surety would not be liable for overhead expenses and alleged loss of profits of appellee, nor for any items except labor, as erroneously allowed by the district court.

5. Appellant is entitled to recover additional reasonable attorney's fees for services on this appeal.

2. THE ACTION BEING BASED UPON A FEDERAL STATUTE, THE MILLER ACT, THE FEDERAL RATHER THAN STATE LAW GOVERNS.

This is admittedly an action brought by the United States for the use of appellee to recover upon a payment bond executed by Macri as principal, and this appellant as surety, pursuant to the federal statute known as the Miller Act. Federal jurisdiction was expressly based thereon in both appellee's pleadings and the court's findings of fact. Jurisdiction is not based upon diversity of citizenship. The principal question on the appeal is a pure question of federal rather than state law, namely, the extent of the liability of the surety on a payment bond executed pursuant to this federal statute. The district court therefore clearly erred in following what he erroneously believed to be the state law in Washington and disregarding the repeated decisions of the federal courts upon this question.

Manifestly an act of Congress such as the Miller Act, should be interpreted uniformly by the federal courts throughout the nation rather than subjected to varying interpretations based upon the purely accidental circumstances of the law of the state in which the federal court is sitting.

This appeal does not even involve any disputed question of construction of the subcontract. It involves only the legal question as to the extent of liability of the surety under the Miller Act. Manifestly the bond is executed pursuant to federal statute and its construction is controlled by federal rather than state law.

If this were not so, why did Congress give *exclusive jurisdiction* of suits on such statutory payment bonds to the federal district courts? It did not have to do this; it could have given both courts concurrent jurisdiction and given plaintiff the option of selecting the forum for enforcing his rights, if any.

Congress chose not to do so, however, probably doubting whether the state courts would uniformly follow the federal law, and therefore vested sole and exclusive jurisdiction of such actions in the federal courts. Otherwise, if state law were to control, it would mean that in one state a plaintiff materialman may recover and in another he may not, even though both of them are claiming under the same federal law. Congress chose not to permit such a situation.

While there must of course be express or implied contract to pay for labor or material before there is any obligation either on the contractor or the surety to pay, yet such a contract standing alone would not create liability on the surety. Its liability, if any, is solely the outgrowth

of the federal statute and the bond executed pursuant thereto. The statute cannot be ignored, but must be directly construed in determining whether or not such liability of the surety exists.

In *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, the landmark case in holding that *in diversity of citizenship cases* the federal courts should follow the state law, the Court construed the "Rules of Decision" statute, U.S.C.A. title 28, sec. 725, which provides:

"The laws of the several States, *except where the Constitution, treaties, or statutes of the United States otherwise require or provide*, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Court in the Erie case said:

"The purpose of the section was merely to make certain that in all matters *except those in which some federal law is controlling*, the federal courts *exercising jurisdiction in diversity of citizenship cases* would apply as their rules of decision the law of the State, unwritten as well as written. . . . *Except in matters governed by the Federal Constitution or by Acts of Congress*, the law to be applied in any case is the law of the State."

In other words both the federal statute and the Erie case construing the same, expressly recognize that state law is not controlling in actions where federal jurisdiction



is based upon federal statute rather than diversity of citizenship.

This was expressly recognized by this court in *Liebman vs. United States*, 153 F. 2d 350, an action based on this same Miller Act in which Judge Garrecht, speaking for this court, said:

“This contention of appellants is bottomed on the *Erie R. Co. v. Tompkins* rule. The *Erie R. Co. v. Tompkins* case, 304 U. S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188, 114 A.L.R. 1487, plainly states: “*Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.*” This case was brought in the name of the government under a federal statute.”

In *U. S. v. Conti* (C.C.A. 1) 119 F. 2d 652, a case involving a federal construction project in Massachusetts, the court held to the same effect, and stated that the federal law rather than the Massachusetts cases, was controlling, saying:

“We do not think that the Bowers case is controlling in the instant case on the liability of the defendant for the damages sustained by the plaintiff as a result of the defendant’s failure to perform. In that case the court’s decision was based, not upon any general principles of the law of contracts, but upon an interpretation and application of Massachusetts statutes regulating the letting of contracts for the construction or repairs of public buildings or other public works on behalf of counties, cities and towns in the state. These regulations of course are not applicable to contracts for public works let by the federal government.”

In *U. S. v. Clifford* (C.C.A. 3) 137 F. 2d 565, (reversed on other grounds in 322 U. S. 102), likewise a Miller Act case, Judge Dobie, speaking for the court, said:

"The court below relied heavily on a number of decisions construing state public work statutes. *These authorities, of course, are not binding on us in the interpretation of federal legislation*, and at best they are deceptive since the purpose, scope and terms of the state enactments are so varied and so different from the act under consideration. . . . Accordingly, for the reasons assigned, the judgment of the lower court is reversed."

In *First Camden Nat. Bank vs. Aetna Casualty Co.* (C.C.A. 3) 132 F. 2d 114, affirming 43 Fed. Supp. 596, 601, to the same effect, the court said:

"The bank is not suing on the bond on which the appellant is surety. If that were the case, the federal court would have jurisdiction not by virtue of diversity of citizenship and the amount in controversy, but by express mandate of the Heard Act, authorizing suit in the federal court in the name of the United States, irrespective of the amount in controversy. 40 U.S.C.A. 270. *Then federal law might well be controlling.* See *United States v. Clearfield Trust Co.*, 3 Cir. 130 F. 2d 93."

In *U. S. v. Clearfield Trust Co.* (C.C.A. 3) 130 F. 2d 93, the court said:

"If the rights of the plaintiff are to be determined by Pennsylvania decisions the judgment of the lower court was right. . . . We think the question is rather whether the rule of *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487,

applies so that we are constrained to look to the law as declared by the state courts as a measure of the rights and liabilities of the parties. *We think it does not so apply. The plaintiff is not in federal court by virtue of diversity of citizenship, but by the expressed provision of the Judicial Code giving it the right to sue.* The payment for which this check was given grew out of services performed under an Act of Congress, the Federal Emergency Relief Act. 15 U.S.C. ch. 16, § § 721-728. The forgery was an offense against the laws of the United States. We think all these facts *distinguish the situation* from that presented in *Erie R. Co. v. Tompkins*, *supra*, where under the diversity of citizenship clause the sole purpose of federal court jurisdiction is to provide a tribunal to dispense justice impartially between citizens of different states. Our conclusion is strongly supported by a group of decisions in which the Supreme Court has been called upon to determine, in the light of *Erie R. Co. v. Tompkins* and cases following it, whether a particular question not expressly answered by the Constitution, treaties or statutes of the United States is to be determined by reference to state precedents or by federal courts in the light of their own body of decisions and their own notions of the proper rule of law. Thus the matter of interest in the recovery of taxes improperly assessed upon Indian lands was held to be a matter concerning which state decisions were not controlling. The same result was reached where the problem was the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act. So, too, the liability for interest of a surety on a bond furnished the United States to accompany a taxpayer's claim for abatement of tax liability was held to be a question upon which state decisions did not control the answer given by the federal court. . . .

"But we do think, however, that in this case the facts in litigation originate fully as directly from the Con-

stitution and statutes of the United States as in the Supreme Court cases just mentioned and in this case, as well as in those, the federal courts are not bound in their determination of the legal consequences of the transaction by what the courts of the state, where the operative facts occurred, have held with regard to the general question involved."

The foregoing was affirmed in *Clearfield Trust Co. v. U. S.*, 318 U. S. 363, 87 L. Ed. 838, where the court said:

"We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, does not apply to this action. The rights and duties of the United States on commercial paper which it issues *are governed by federal rather than local law*. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of (April 8) 1935, 49 Stat. 115, c 48. The authority to issue the check *had its origin in the constitution and the statutes of the United States* and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Jackson County v. United States*, 308 U. S. 343, 84 L. ed. 1361, 61 S. Ct. 995. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick v. Greaney*, 309 U. S. 190, 84 L. Ed. 694, 60 S. Ct. 480; *D'Oench, D. & Co. v. Federal Deposit Ins. Corp.* 315 U. S. 447, 86 L. ed. 956, 62 S. Ct. 676.. In absence of an applicable Act of Congress *it is for the federal courts to fashion the governing rule of law according to their own standards*. . . .

"But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper



from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. ed. 365, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions."

In *United States v. Maryland Casualty Co.*, 64 Fed. Supp. 522, 527, Judge Yankwich said:

*"In interpreting specific obligations under a federal public works statute such as the Miller Act, we are governed by federal law."*

In *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 85 L. Ed. 1361, involving the liability of a surety in a bond given the federal government, Justice Stone, speaking for the court, said:

*"But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due."*

In *D'Oench v. Federal Deposit Insurance Corp.*, 314 U. S. 447, 86 L. Ed. 956, the court, referring to the Klaxon case, said:

"We held in the latter decision that a failure of a federal court in a diversity of citizenship case to follow the forum's conflict of laws rules "would do violence to the principle of uniformity within a state" upon which *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, was based. 313 U. S. at p 496. The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued in any court of law or equity, State or Federal. . . .

"For we are of the view that the liability of petitioner on the note involves decision of a federal not a state question under the rule of *Deitrick v. Greaney*, 309 U. S. 190, 84 L. ed. 694, 60 S. Ct. 480."

Justice Jackson, in a concurring opinion, said:

"These recent cases, like *Swift v. Tyson* which evoked them, dealt only with the very special problems arising in diversity cases, where Federal jurisdiction exists to provide nonresident parties an option forum of assured impartiality. *The Court has not extended the doctrine of Erie R. Co. vs. Tompkins beyond diversity cases.*

"This case is not entertained by the Federal Courts because of diversity of citizenship. . . .

"A Federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling

effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the Federal Constitution, statutes, or common law. Federal common law implements the Federal Constitution and statutes, and is conditioned by them. Within these limits, Federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Jackson County vs. United States*, 308 U. S. 343, 350, 84 L. ed. 313, 316, 60 S. Ct. 285."

In *Alameda County v. U. S.*, 124 F. 2d 611, involving a public works contract with the federal government for the improvement of San Leandro Bay, this court said:

"Regarding cases governed by federal statutes, shortly after the decision of *Erie R. Co. v. Tompkins*, *supra*, it was held that state law was not applicable in a tax case governed by a federal statute. *Lyeth v. Hoey*, 305 U. S. 188, 194, 59 S. Ct. 155, 83 L. Ed. 119, 119 A.L.R. 410. No reference was therein made to *Erie R. Co. v. Tompkins*, *supra*. However, in subsequent cases, it is made clear that in those controversies where a federal statute controls, state law is not applicable, in conformity with the statement of the rule in *Erie R. Co. v. Tompkins*, *supra*, *Dietrick v. Greaney*, 309 U. S. 190, 60 S. Ct. 480, 84 L. Ed. 694; *Russell v. Todd*, 309 U. S. 380, 60 S. Ct. 527, 84 L. Ed. 754; *Royal Indemnity Co. v. United States*, 313 U. S. 289, 61 S. Ct. 995, 85 L. Ed. 1361. Do not these cases demonstrate also that the statement in *Erie R. Co. v. Tompkins*, *supra*, that there 'is no federal general common law' is in words too broad, because it is apparent that in such cases such law is applied?"

In U. S. for use of *Spencer v. Maryland Casualty Co.* (C.C.A. 6) 18 F. 2d 204, the court held that the liability of the surety on a bond executed pursuant to the Miller Act is measured by the federal statute.

In U. S. for use of *Johnson v. Morley Construction Co.*, 20 Fed. Supp. 606, involving the Heard Act, the predecessor of the Miller Act, the court said:

“As I have heretofore held in an opinion on a motion in this case . . . the Federal Conformity Act. 28 U. S. C.A. Sec. 724, has no application to a suit under the so-called Heard Law, Accordingly the aforementioned provisions of the (N. Y. State) Civil Practice Act do not apply.”

See also to the same effect:

*Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 87 L. Ed. 165;

*Guaranty Trust Co. v. York*, 326 U. S. 99, 89 L. Ed. 2079;

*U. S. v. Grogan*, 39 F. Supp. 819;

*American Surety Co. v. First National Bank*, (C.C.A. 4) 141 F. 2d 411, 416;

*O'Brien v. Western Union Telegraph Co.* (C.C.A. 1) 113 F. 2d 539.

### 3. THE STATE LAW ALSO SUPPORTS APPELLANT'S POSITION.

While this phase of the argument is of relatively minor importance, for the reasons hereinabove stated, nevertheless in passing we point out that the law of the State of



Washington supports, rather than opposes, the position of appellant herein. The following Washington cases definitely establish that the surety is not liable:

In *Lidral-Wiley, Inc. v. U. S. Fidelity & Guaranty Co.*, 179 Wash. 631, 38 P. 2d 346, in affirming dismissal of an action against the surety on a contractor's bond, the supreme court of Washington said:

"Upon the challenge by respondent at the conclusion of the evidence, which was all introduced by appellant, the trial court sustained the challenge and dismissed the case, upon the grounds that appellant had failed to sustain the burden as to the bonding company of proving any right to recover any sum in excess of what it had already received; and therefore, as to the bonding company the motion for non-suit was granted. . . .

"Appellant concedes *the rule followed in this state that it can in no event recover more than the amount due under the contract*; and as to rentals, can hold respondent liable only for the reasonable rental value of the equipment for the days it was actually moving and in operation.

"Both parties conceded, and the trial court followed, the principles laid down in *State Bank of Seattle v. Ruthe*, 90 Wash. 636, 156 Pac. 540, and *Puget Sound Bridge & Dredging Co. v. Jahn & Bressi*, 148 Wash. 37, 268 Pac. 169, where we laid down the rule that a claim against the bond can only be for the reasonable value of the use of the rented machinery *not exceeding the contract price*, and for the time during which the proof clearly showed the machinery to have been used in the work. . . .

"The testimony is not at all definite and certain as to what was the actual number of days the Kenworth truck was in use under that provision of the contract. Conceding, however, it was in actual use one hundred days, as claimed by the appellant, which would amount to one thousand dollars, and that the other equipment was used as claimed by appellant, the total amount under the evidence and under the contract, *not exceeding the contract price* for the rental of such equipment is \$3,143.48. Appellant has undisputedly been paid by the contractors and by Grant County a total of \$3,869.31, making an over-payment of \$725.91." (Above italics are the court's).

The court concluded as follows:

"Appellant's claim that it is not bound by the written contract, and the surety is liable for the reasonable rental value of the machinery used as orally understood before the written contract was made, is untenable. Under the cases cited above, **THE SURETY CAN IN NO EVENT BE BOUND FOR A RENTAL VALUE IN EXCESS OF THE CONTRACT.** Although appellant contends that it is not bound by the written contract for the reason that it is binding only as between the parties thereto appellant sued upon the written contract as a part of its cause of action. **IF THE PRINCIPAL CONTRACTORS WHO SIGNED THE CONTRACT WITH APPELLANT ARE NOT BOUND OR LIABLE, THE SURETY MANIFESTLY WOULD NOT BE BOUND.**

"**WE HAVE NEVER PERMITTED RECOVERY AGAINST A SURETY ON A PUBLIC CONTRACTOR'S BOND FOR A GREATER RATE OF COMPENSATION THAN THAT PROVIDED FOR BY CONTRACT,** and the cases cited by appellant, mentioned below, have not varied from that rule."

In *Terry v. U. S. Fidelity & Guaranty Co.*, 196 Wash.

206, 82 P. 2d 532, 119 A.L.R. 1276, the supreme court of Washington decided this question in favor of the surety, saying:

“Respondent brought this suit against the surety company, setting up two causes of action: (1) For recovery of the balance due for material actually removed; (2) for damages, by way of loss of profits, by reason of the fact that he was prevented by the contractors from removing some 4,742 cubic yards additional material contemplated by the contract. The jury returned a verdict on the first cause of action for \$748.27, and for \$348.33 on the second. Judgment was entered accordingly. . . .

“Whether unliquidated damages for breach of contract may be recovered against such a bond as this, is a question of first impression in this state. A number of cases have been cited which are thought to bear one way or the other upon the question. From our reading of the cited cases, it seems to us that only three deal with the subject specifically enough to require notice. *Burton v. Seifert & Co.*, 108 Va. 338, 61 S. E. 933; *Haakinson & Beaty Co. v. McPherson*, 182 Iowa 476, 166 N. W. 60; *Kampeska Materials Co. v. Bone*, 52 S. D. 559, 219 N. W. 244. In the first case, it is flatly held that such damages may be recovered against the bond. The second case seems to so hold, although it would appear that the bond there sued upon contained broader provisions than required by the statute. In the third case cited, it is flatly held that such damages are not recoverable against a statutory bond of this character.

“We feel, however, that, regardless of holdings in other jurisdictions, the question should be determined in the light of our own cases construing bonds executed pursuant to Rem. Rev. Stat., § 1159. Speaking of the purpose of bonds required by that statute, the court,

in the case of *American Sav. Bank & Trust Co. v. National Surety Co.*, 104 Wash. 663, 177 Pac. 646, said:

“It should be borne in mind that the legislature had in view here public works and buildings and was providing security and protection only to those who, if the work were private in its nature, would be protected by the lien laws. In other words, the bond given under this statute and in the statutory language becomes a substitute for the right of lien which would exist were the work private. And, therefore, looking to analogous lien cases for a rule as to who may claim under the bond, we find the prevailing doctrine to be that one who loans money is entitled to no lien therefor. . . .

“Hence, it logically follows that one who loans money to a contractor on public work cannot claim under the statutory bond.”

“And, in actions upon such bonds, the court has applied that standard of liability. The inquiry has uniformly been directed as to whether the claimant furnished labor, provisions or supplies, for the carrying on of the work. *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108; *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337; *City Retail Lumber Co. v. Title Guaranty & Surety Co.*, 72 Wash. 300, 130 Pac. 345; *State Bank of Seattle v. Ruthe*, 90 Wash. 636, 156 Pac. 540; *Puget Sound Bridge, etc. Co. v. Jahn & Bressi*, 148 Wash. 37, 268 Pac. 169; *National Grocery Co. v. Maryland Casualty Co.* 148 Wash. 387, 269 Pac. 4, 65 A.L.R. 256. In the next to the last case cited, the court said:

“Our rule is that, as against the bondsman of the principal contractor, a subcontractor performing services, or a materialman furnishing materials, can not recover in excess of the reasonable value of the services per-



formed or the reasonable value of the materials furnished.'

"Now, in the light of this statement and the rule as stated in *American Sav. Bank & Trust Co. v. National Surety Co.*, *supra*, we think it is clear that the bond is not liable for an unliquidated claim for damages against the contractor. For it is the general rule that unliquidated claims for damages against a contractor cannot be established as a lien against the property upon which labor is performed or materials furnished. 40 C. J. 92, § 75; *Priest v. Murphy*, 103 Ark. 464, 144 S. W. 921; *Favalora v. Bourgeois*, 164 La. 521, 114 So. 119; *Goldberger-Raabin, Inc. v. 74 Second Avenue Corp.*, 252 N. Y. 336, 169 N. E. 405; *Dyer v. Wallace*, 264 Pa. 169, 107 Atl. 754; *St. John, etc. R. Co. v. Bartola & Genaro*, 28 Fla. 82, 9 So. 853; *Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157; *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490. Hence, as indicated in *American Sav. Bank & Trust Co. v. National Surety Co.*, *supra*, a subcontractor who has an unliquidated claim for damages against the contractor cannot establish the claim against the statutory bond.

"The cause is remanded, with directions to modify the judgment accordingly."

The last word of the Washington state supreme court on the general subject is *Hamilton v. Whittaker*, 129 Wash. Dec. 164, 186 P. 2d 609, decided December 10, 1947, in which the court narrowly restricted the liability of the surety on a contractor's bond, and after summarizing some of its former decisions, said:

"We agree with the conclusion of the trial court. It is the duty of contractors on public works to furnish, at

their own expense, the machinery and equipment necessary to perform the work. . . .

“We hold that the charges for freight on equipment used by the contractor cannot be recovered as against the bond or the retained percentage.”

In *Black Masonry & Contracting Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517, the court laid down the following rule for determining the liability of such sureties:

“When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the other, this court has, like all others, held the parties to their contract; for as is said in the books, ‘*a surety is bound by the contract he made, and not by some contract which he did not make*, even though the latter may be more favorable to him than the former.’ *Sureties and guarantors are not to be made liable beyond the express terms of their contract.* The only question open in such cases is to determine what the contract is and enforce it.”

In *Martin v. Shaen*, 26 Wn. 2d 346, 173 P. 2d 968, the court held that one cannot do indirectly what cannot legally be done directly.

Under the foregoing Washington decisions therefore, there is no liability of the surety herein in excess of the agreed contract price.

#### 4. SURETY ON PAYMENT BOND UNDER THE MILLER ACT IS NOT LIABLE FOR DAMAGES OR INCREASED COSTS SUSTAINED BY SUB-

## CONTRACTOR BY REASON OF BREACH OF CONTRACT BY PRINCIPAL CONTRACTOR.

The Miller Act, upon which this action is based, (U.S. C.A. title 40, sec. 270a and 270b) requires on every

“contract, exceeding two thousand dollars in amount, for the construction, alteration or repair of any public building or public work of the United States . . . a payment bond with a surety or sureties, satisfactory to such officer *for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract* for the use of each such person.”

Section 270b provides:

“Every person who *has furnished labor or material in the prosecution of the work provided for in such contract*, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him, for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him.”

The pertinent language of the bond herein sued upon (Pltf. Ex. 1; 96, 158, 172) is as follows:

“Pursuant to the Act of Congress approved August 24, 1935, . . . “Now, therefore, if the principal shall promptly make payment to all persons *supplying labor and material in the prosecution of the work provided for*

*in said contract*, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

However, in this case appellee is seeking to enlarge the legitimate scope of this statutory and contractual liability of appellant. Manifestly this liability is restricted to claims for "*labor and material in the prosecution of the work provided for in said contract*," namely, the contract between Macri and the government. This language is repeated in both the quoted sections of the statute and in the bond. That is clearly the maximum extent of the surety's liability contemplated by Congress when it enacted this statute and contemplated by the parties when they signed this bond.

But here appellee is seeking to recover damages for breach of either the subcontract or the prime contract, or both, on the part of Macri. True, he is seeking to do so by fallacious guise of seeking recovery of an alleged unpaid balance of the reasonable value of the work performed. However, with the relatively slight exception hereinabove stated (the retained percentage in the sum of \$2656.46) appellee admittedly received from Macri prior to commencement of suit, full payment of the agreed contract price under the subcontract.

Moreover, as hereinabove pointed out, appellee's own



witnesses admitted that the said agreed contract price, namely \$26.00 per cubic yard of concrete, represented the full reasonable value of the services performed by appellee under the subcontract. Admittedly, the only thing which increases appellee's claim above that point is the alleged breach of contract by Macri: (1) This breach, according to appellee's evidence, rendered it necessary for the latter to do various things which were outside of the scope of appellee's duties under his subcontract and which were things that were agreed to be performed by Macri. (2) Secondly, appellee's claim is increased above his contract price by reason of the fact, as he contends, that Macri breached his contract, and that this greatly delayed appellee in the performance of his work and increased his expense of doing so. There is no segregation of the amounts of these two claims.

Clearly neither of these claims constitutes a legal liability of the surety. Both of them manifestly constitute merely an indirect method of paying appellee damages for Macri's breach of contract, and therefore not recoverable from the surety. *Neither of these claims is for "labor and material in the prosecution of the work provided for in said contract."* They are both outside of rather than within the scope of the contract. Both of them were far in excess of the reasonable value of the concrete work appellee agreed to perform under the subcontract.

Appellee's contention and the district court's judgment seek to place in the Miller Act a guarantee by the surety which Congress deliberately chose to omit. They seek to write into the bond a guarantee provision which is nowhere to be found within the four corners of that instrument. They seek to make a contract for the parties, and particularly for this appellant surety, which none of the parties, and certainly not this appellant, ever agreed to. Clearly this cannot lawfully be done.

Neither the Miller Act nor this bond states or even suggests that the surety undertakes the obligation of guaranteeing payment to subcontractors or others of damages sustained by them by reason of breach of either the prime contract or the subcontract by the principal contractor.

Consequently, to so extend the surety's liability would be wholly illegal and unjustifiable.

So long as laborers, materialmen and subcontractors are paid the full amount of their agreed contract prices for the work which they contracted to perform, the intent of Congress has been carried out and the liability of the surety has been fully satisfied.

This case suggests a ready object lesson of the undesirable practical consequences if appellee's view were accepted. It will be noted that the district court entered judgment in favor of a single claimant against the surety

for \$56,764.97, together with interest and costs, which is almost the full amount of the payment bond, namely \$64,-275.48. The Miller Act prescribes that the amount of the payment bond shall be one-half of the contract price. It will thus be seen that this left only a relatively small balance of \$7510.51 to furnish protection to the large numbers of laborers and materialmen, as well as other subcontractors, if any. Such an interpretation would be most unfair to the other laborers and materialmen, and would certainly be wholly opposed to the intent of Congress in enacting this legislation for their benefit and protection.

Such an unwarranted expansion of the liability of sureties on such bonds would also mean a substantial increase in the premiums charged therefor, and a resulting increase in the amount of contractors' bids and in the cost to the government of all public construction projects.

Appellee concedes that he has made no attempt to segregate his costs of performing his subcontract as originally agreed to, and his *increased costs* of performing his subcontract *plus* a portion of *Macri's obligations* under the prime contract, by reason of Macri's breach thereof. This is conclusively shown by the portions of the record hereinabove quoted in the statement of the case.

It is further self evident that appellee's claim is outside of, rather than within, the contract.

It is not within, nor governed by, any obligation undertaken by appellee when he entered into this contract. It is admittedly practically double the reasonable value of the work to be performed by Schaefer under the subcontract. Appellee's claim admittedly arises from a large amount of work performed by his men which was entirely outside of the scope of his concrete work under his subcontract.

Likewise, as to the second phase or category of appellee's claim, namely, that his cost of performance was increased by Macri's delay and improper performance of his obligations under the subcontract and principal contract—this also is clearly outside of the scope of the reasonable value of the work agreed to be performed by Schaefer under these contracts. It follows that the claim is entirely outside of the scope of the surety's liability under the statutory payment bond.

*Appellee's claim is directly predicated on Macri's alleged breach of contract and not on appellee's furnishing of labor and material pursuant to contract.*

A surety, under the Miller Act, is clearly not liable for damages for breach of contract by the principal contractor, either on *quantum meruit* theory or otherwise. Especially is this true where, as in this case, there is admittedly no segregation of the claimant's expense items within and outside of the contract.



Obviously compensation for any loss or increased cost sustained by appellee due to acts or omissions of Macri in breach of the contract is damages, no matter by what name it may be called. "A rose by any other name will smell as sweet."

Appellee concedes that he was not required to pour a single yard of concrete in addition to that originally contracted for. The scope of his contract was never increased. The additional costs sued for are merely claims for items of damage caused by Macri's breach. The surety should certainly not be penalized and subjected to an action for damages merely because it is labeled quantum meruit—and especially so when it is admitted that the claim arises entirely by reason of the fact that appellee was damaged, as he contends, by Macri's breach. Admittedly there was nothing unusual about the performance of the work by Schaefer except that he complains of Macri's acts and omissions which resulted in increasing his costs.

Appellee must concede that all his costs over and above his contract price were directly caused by and attributable to Macri's breach. How, then, can he reasonably deny that what he is actually seeking here is to recover from the surety damages for Macri's breach of contract? This is an obligation never assumed in the surety's contract and never imposed upon it by Congress.

Appellee's claim is based upon damages for Macri's

breach and damages which are entirely outside of the scope of the contract. So long as appellee has admittedly received full payment (with said slight exception) of the full agreed contract price under the subcontract, and which also admittedly represented the full reasonable value of the work to be done by appellee under the subcontract, there cannot possibly be any further liability of the surety to appellee.

Obviously the surety is not a party to the subcontract between Macri and Schaefer, and by its payment bond appellant did not guarantee performance of the contract on the part of either and did not assume liability to either for damages for breach thereof.

The only obligation assumed by the surety under this bond was to guarantee payment of the agreed contract price for labor and materials furnished in the prosecution of the work under the contract. The surety did not guarantee payment for labor and materials furnished because the prime contractor breached his contract by delaying the job or failing in some other way to do things required of him under the subcontract.

Appellee's whole claim is predicated upon the fact that due to Macri's fault appellee was required to do work that was not required of him under his subcontract, and which it would not have been necessary for him to do except for Macri's failure to perform his part of the sub-

contract. Obviously, however, a claim to be compensated for this additional expense or for damages based thereon, is not a claim for 'labor and materials in the prosecution of the work provided for in the contract," but rather is a claim for damages for compensation for work which was rendered necessary for him to do because of Macri's failure to do so as required by the subcontract. Admittedly, if Macri had performed his obligations under the contracts, none of this additional labor and expense would have been required, and since it never was required in the performance of Schaefer's obligations under the subcontract, it does not constitute a valid claim against the surety.

Appellee's contention is especially unfair to the surety in view of the admitted fact that the latter never had notice of Macri's alleged breach until after the job was fully completed. If its liability were so extended, it had no fair opportunity to protect itself.

This unwarranted extension of the surety's liability is wholly illegal as compensation for damages sustained through Macri's breach, even though sugared with the verbiage that the same represents a reasonable value of work performed. Appellee cannot deny, however, that the only reason that reasonable value of his work was increased above the amount heretofore paid, was by reason of the damages he sustained due to Macri's breach.

*This increased expense of performance was outside*

of the scope of appellee's obligations under the subcontract and outside of the scope of Macri's obligations under the prime contract with the government. What was done by appellee, not already fully paid for, was not required by any of the terms of the contract, but became necessary because of Macri's alleged breach or wrong against appellee, resulting in loss or damage to him.

The Columbia Basin Project within the territorial jurisdiction of this court (as well as other federal irrigation construction projects) is just in its infancy. Certainly the commendable purpose of protecting labor and material on government projects should not be confused with allowing unlimited recovery of damages for losses sustained in any guise where there is a breach of a subcontract, as between prime contractor and subcontractor.

In *United States v. Seaboard Surety Co.*, 26 F. Supp. 681, Judge Baldwin, of Montana, held that the surety's liability could not be so extended, saying:

"It is said in *U. S. to Use of Hill v. American Surety Company*, 200 U. S. 197, 203, 26 S. Ct. 168, 170, 50 L. Ed. 437: 'The purpose of the law is, as its title declares: 'For the protection of persons furnishing materials and labor for the construction of public works;''" which evidently does not include a guarantee of profits which a contractor or subcontractor may expect to make, or a promise to make good any loss that either of them may suffer. If such had been the Congressional intent, it would have been easy to express it in plain words. This was not done; and, on the other hand



*Congress limited the right to bring suit on the bond in the name of the United States to the person or persons supplying the contractor with labor or materials and to them only upon furnishing affidavit to the department under the direction of which said work has been prosecuted that labor and materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made. The bond involved in this case appears to be conditioned as provided in this statute and it must be read in the light of the true intent and purpose of the act. . . .*

*“To hold that Watsabaugh & Company have a right to recover from the defendant Seaboard Surety Company for the loss, if any, suffered by them because of delays growing out of the acts or omissions of others would be to add to the terms of the agreement. This the law does not permit. In the construction of an instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. . . . It follows that Watsabaugh & Company have no right to recover from the defendant Seaboard Surety Company for the loss, if any, suffered by them because of delay growing out of acts or omissions of others.”*

Also directly in point is the leading case of *Friestedt Co. v. U. S. Fireproofing Co.*, (C.C.A. 10) 125 F. 2d 1010. The court approved the Montana case and held that the surety's liability could not be so extended, saying:

*“Stripped of all technicality, plaintiff and intervenor seek to recover damages claimed to have been incurred because of the breach by the contractor of an implied covenant in the subcontract against unreasonable delays preventing the subcontractors from proceeding*

*with their work.* The parties recognize this, because in the only point relied upon in their designation of points, it is asserted that: ‘. . . a subcontractor can recover his damages consisting of expenses made necessary by the delay of the principal contractor in a proceeding to recover on the bond under the Heard Act, 40 U. S. Code, Sec. 270.’ They cite numerous authorities to sustain their position that every contract contains an implied warranty against unnecessary delays and that recovery may be had for loss resulting from a breach thereof. *These decisions are beside the point, because they arose in actions against the contractor for damages and not against the surety on a Heard Act bond. . . .*

“In each of these cases the Act was liberally construed to protect those furnishing labor and material that went into the construction covered by the contract. It is to be noted, however, that in every instance recovery was allowed on the bond because the outlays for which recovery was sought were necessary for the performance of the contract and were within the contemplation of the parties to the contract.

“Here the contract required plaintiff and intervenor to furnish labor and material and perfect certain constructions. They performed their part of the agreement and received their agreed compensation provided for in the contract. There is here no claim that they furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract. *The claim for which the parties seek recovery here did not arise under the contract, but outside of the contract. What was done was not required by any of the terms of the contract, but became necessary because of an alleged breach of the contract because a contractor violated one of the terms of the contract; in other words, committed a wrong against the parties resulting in loss or damage to them.*

*"We know of no case that has gone so far as to hold that one may recover damages for breach of a contract on a bond required under the Heard Act. The only case deciding this precise question has held to the contrary. See United States v. Seaboard Surety Co., D. C. Mont., 26 F. Supp. 681. We fail to discern anything in the Heard Act evidencing a Congressional intent to protect one under the bond required by the Act against damages resulting from breach of contract. Had such been the Congressional intent, it no doubt would have been evidenced by appropriate language."*

In *U. S. v. Maryland Casualty Co.*, 54 F. Supp. 290, the court discussed, and refused to follow, the two Washington cases relied upon by appellee, but followed the rule of the foregoing federal cases. The court even granted a summary judgment of dismissal in favor of defendant surety, and said:

*"We are unable to distinguish in principle the present from the Friestedt case. While the plaintiff calls its demand one for the rental or the use value of its equipment, it is in reality for the damage caused by keeping the equipment idle in compliance with the orders of the Government engineer—in other words, for a breach of the implied obligation that it would be permitted to perform without interference. It is not a claim for money paid to others for the rental of the machinery, as was true in some of the cases cited, but for what it lost, because of its inability to use or remove the equipment. . . ."*

*"The conclusion is that the nature of the demand is such that it does not disclose a right to recover against the surety for labor and materials furnished under the statute and bond given pursuant thereto."*

The foregoing decision was affirmed in *U. S. v. Maryland Casualty Co.*, (C.C.A. 5) 147 F. 2d 423, where the court said:

"Upon answer and amended answer of Bond Company the issue finally, and according to appellant, was amplified to: 'Whether or not a surety on a bond given under 40 U.S.C.A. § 270a is liable for the use value of or rent on equipment furnished in the prosecution of public work, while such equipment is kept idle on the job by the government engineer in charge of the work, but for no reason contemplated by the contract. Stated differently, is or not the use value or rent on equipment, under the circumstances stated, 'material' within the meaning of and covered by such statute and bond? . . . .

"While the question here is not without its difficulties, the great weight of authority leads to the conclusion that while such a bond with its enabling enactment, which we have here under consideration, must be liberally construed, we are not warranted in writing liability into the contract and the statute. Nothing was owing for work, labor or equipment, and nothing was owing for material in the prosecution of the work; no modifications of the contract had been made or were contemplated. All that transpired was that, without fault of the subcontractor, the Government engineer ordered the work stopped and declined to permit the removal of equipment. *This was a breach of the contract, and it may be that appellant is entitled to recover for this breach as against the prime contractor or the Government, or both, but it becomes patent that we are not warranted in fastening upon the Casualty Company liability on its bond for this breach. Friestedt Co. v. U. S. Fireproofing Co.*, 10 Cir., 125 F. 2d 1010; *United States for the Use of Spencer v. Massachusetts Bonding Co.*, 6 Cir., 18 F. 2d 203; *Clifford F.*



*MacEvoy Co. v. United States for Use and Benefit of the Calvin Tompkins Co.*, 322 U. S. 102, 64 S. Ct. 866; *American Surety Co. v. Wheeling Structural Steel Co.*, 4 Cir., 114 F. 2d 237; *Babcock & Wilcox v. American Surety Co.*, 8 Cir., 236 F. 340; *United States, to Use of Watsabaugh & Co., et. al. v. Seaboard Surety Co.*, 26 F. Supp. 681; *United States v. Hercules Co.*, D. C. 52 F. 2d 454. . . .

"The appellant has cited many cases which we have carefully considered. In every instance, however, where recovery was allowed on the bond, the outlay for which recovery was sought was necessary for the performance of the contract and was within the contemplation of the parties to the contract. It is without dispute that the injury alleged to have been suffered here by the appellant was not contemplated by the parties, but was totally unexpected and unforeseen.

"We are of opinion and so hold that Maryland Casualty Company should be and is absolved from liability on its bond.

"We find no reversible error in the record and the judgment is affirmed."

The authority which we especially desire to stress is the decision of Judge Coleman of Maryland in *United States v. John A. Johnson & Sons*, 65 F. Supp. 514, 526-632. The district court in instant case frankly conceded that his decision was diametrically opposed to that of Judge Coleman, and that that case, if followed, would preclude recovery by appellee herein against the surety. (2215). He also stated that that case should be followed if federal

law governs. The court quoted and followed the foregoing federal authorities and said:

"The questions now before us arise out of a suit under the Miller Act, § 1, 40 U.S.C.A. § 270a. . . .

"The substance of the second counterclaim is that the general contractor, although having expressly agreed to provide temporary construction of every nature, necessary to the completion of the work on the project by the subcontractor within the specified time, including the providing of access to the construction site, the general contractor nevertheless failed to provide such access and that, as a result, the progress of the work by the subcontractor was materially interfered with and delayed, *thus greatly increasing the cost to the subcontractor*, whereby he was damaged in the sum of \$13,740.01. . . .

"Coming, then, to the motion to dismiss the other counterclaim of the subcontractor Friedman, the basic question here is whether under the Miller Act a subcontractor may recover damages against a general contractor and his surety on a *claim which is directly predicated on a breach of contract by the general contractor and not on the furnishing of labor and material by a subcontractor pursuant to contract*.

"That this is a suit by the subcontractor for such breach of contract by the general contractor seems clear. . . .

"It may well be that the subcontractor has a meritorious claim against the general contractor, in a separate suit in a State court (not in a Federal Court because diversity of citizenship is lacking), but the question here is: Can this claim be prosecuted in this particular statutory proceeding? Under the statute, the general contractor is required to give two bonds: One a performance bond for the protection of the Government;

the other a payment bond for the protection of persons furnishing labor and materials. It is the latter with which we are here concerned. Its obligation is to "promptly make payment to all persons supplying labor and material in the prosecution of the work *provided for in said contract*, and any and all duly authorized modifications of said contract that may hereafter be made. . . . *Thus, it is clear that the obligation by which the general contractor and surety are bound to subcontractors excludes payment for everything except labor and material actually called for by the contract between the general contractor and the Government, which is made a part of the contract between the general contractor and the subcontractor.*

"We have been referred to no proceeding, either under the Miller Act or the Heard Act, 40 U.S.C.A. § 270, of which it is an amendment, where jurisdiction over a claim such as the present one has been exercised. . . .

"However, we think this is immaterial, provided the subject of the suit arises under the contract, or under the provisions of contracts that are reciprocal. We do not find that such is true in the case before us. . . .

"To repeat, we think a distinction must be made between doing work which is of an extra or additional character, or reasonably implied by the terms of the contract as part of the obligation of the subcontractor, and work which, *as in the present case, not he but the main contractor alone is, by the very terms of the agreement, required to do. The distinction is, in a sense, narrow and technical, but it goes to the very essence of the restricted rights given by this special statute, the Miller Act. We are not unaware of the fact that there are numerous decisions to the effect that a liberal construction must be given to the Miller Act and its predecessor, the Heard Act. . . . But the liberality of construction referred to in those decisions is not meant to go so far as to extend the scope of the*

*Act and to embrace a claim for damages such as the present one. . . .*

"It must necessarily follow that the Rules of Civil Procedure, and specifically Rule 13 (a), (b) and (h), can not be construed to extend the scope of the Miller Act. . . .

"It may well be that in an ordinary suit, these Rules would extend the scope of the action to permit the consolidation of all claims. But we are unwilling to say, just because of their broad language, that the present type of claim can be entertained in a Miller Act proceeding.

"Finally, it may reasonably be argued from the dearth of authorities on this precise question, that, *in line with the Friestedt case, it has been generally conceded that this type of claim was not cognizable under either the Heard Act or the Miller Act.* But however that may be, *both the weight of such authority as exists, and logical interpretation of the statute, require the conclusion here reached.*

"We are not unmindful of the fact that, in another part of this same proceeding we have allowed this same subcontractor to recover from the general contractor on a counterclaim for extra material and labor he had furnished, on the ground that there was an improper rejection by the general contractor of the material originally supplied. That is to say, we held that the subcontractor was entitled to be paid what this improper rejection had cost him, due to replacing the material with material of higher grade.

"Such counterclaim, it is true, was based upon breach of contract in the sense that the general contractor had not lived up to his part of the agreement in so far as a duty to inspect the material, originally supplied, was imposed upon him in the first instance. However,



by the express terms of the last paragraph of Article IV of the subcontract, which we have previously quoted, the subcontractor and not the general contractor was required to replace the material when ordered so to do by the general contractor, without prejudice to the right given him by the subcontract to have a later determination as to whether or not he should have reimbursement, for any additional expenditures as a result of such replacement. So, it will be seen that the performance by the subcontractor, upon which he based his right to recovery, was *performance such as was expressly required of him by the contract for which, and only for which, he could recover under the payment bond* which we have heretofore analyzed; whereas, in the present case, there is the distinction that the subcontractor has not supplied labor and materials which he was, in fact, ever required to supply by the terms of the contract. Thus, *the subcontractor's present counterclaim is for damages as such, resulting from the general contractor's alleged breach of the contract, although it is true the alleged damages are measured by the cost of labor and materials to the subcontractor which the general contractor, if any one, should have supplied but did not. The distinction is more than a mere technical one. It is a legal distinction required by the very terms of the documents by which the subcontractor is restricted in this limited, statutory proceeding.*

"Accordingly, an order will be signed granting the motions to dismiss both the counterclaims of the subcontractor."

Parenthetically, it may be added that no appeal was taken by the claimant from the hereinabove quoted portion of Judge Coleman's decision. An appeal was taken from an entirely different portion of that decision and the same was affirmed and the decision expressly approved in

(C.C.A. 4) 153 F. 2d 534, certiorari denied, 328 U. S. 865 90 L. Ed. 1636. Judge Coleman's decision related to two entirely separate and independent phases of the case, the second phase, and the one pertinent here, commencing at page 526. At page 525 the court said:

*"The distinction between the two questions is real, not fanciful. For example, delays incident to permitted changes in original specifications do not amount to a breach of a contract of this sort. It is a matter for equitable adjustment by the Government by express provision of the general contract relating to changes."*

See also to the same effect *U. S. for Use of Spencer v. Massachusetts Bonding & Ins. Co.*, (C.C.A. 6), 18 F. 2d 203.

We therefore respectfully submit that both on reason, principle and authority, and particularly the overwhelming trend of the federal decisions, there is no liability of a surety on a payment bond for damages or compensation for increased expense of performance by a subcontractor due to breach of contract on the part of the principal contractor, whether or not such damages are sought under the sheep's clothing of reasonable value of work performed—especially where, as in this case, it is conceded that the cost and reasonable value of performance were increased over and above the agreed contract price and above the amount paid solely by reason of the principal contractor's breach of contract.

The language of the Supreme Court in the recent

case of *McEvoy v. United States*, 322 U. S. 102, 88 L. Ed. 1163, the last word of that Court on the subject, (while involving a different question) is we submit directly applicable to this question:

“We granted certiorari because of a novel and important question presented under the Miller Act. 320 U. S. 733, ante 433, 64 S. Ct. 267. . . .

“Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Goernment contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot. . . .

“To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act. . . .

*“To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative. Here the proviso of § a (a) of the Act forbids the imposition of such a risk, thereby foreclosing Tompkins’ right to sue on the payment bond.”*

##### 5. IN ANY EVENT SURETY NOT LIABLE FOR ANY ITEMS EXCEPT LABOR EXPENSES.

In any event the district court clearly erred in allowing recovery for any items other than labor and materials actually going into the finished job. For example, the court

with considerable hesitation and reluctance allowed recovery of an additional twenty percent of the total amount of appellee's claim, namely \$13,542.57, for "overhead expense" and allowed an additional ten percent of the total, or \$8,125.42, for appellee's profit.

Such overhead expense and profit items are not for labor and materials, and are not recoverable against the surety.

*U. S. v. Davidson*, 71 F. Supp. 401;

*U. S. for use of Healie v. Great American Indemnity Co.*, 30 F. Supp. 613;

*U. S. v. Standard Casualty Co.*, 32 F. Supp. 836;

*Continental Co. v. Boyd*, 140 F. 2d 115;

*Theobold-Jansen Electric Co. v. Meyer*, (C.C.A.) 87 F. 2d 271;

*U. S. for use of Spencer v. Massachusetts Bonding & Ins. Co.*, (C.C.A. 6) 18 F. 2d 203;

*Hamilton v. Whittaker*, 129 Wash. Dec. 164, 186 P. 2d 609, *supra*, and cases there cited.

Exhibit 63 contains appellee's itemized computation of his claim for damages. The first item, which is the largest, covers alleged labor expense. The remainder are clearly, in any event, not allowable, as they do not constitute claims for labor and material going into the finished job. Part of them represent the purchase and repairing of tools and equipment, which are clearly not a lienable claim against the bond. This applies to all of the items



on this exhibit other than the strictly labor items. Under the authorities hereinabove cited, these are clearly not, in any event, recoverable against the surety. Such items as insurance, taxes, equipment, lumber and roofing for cement shed, travel, miscellaneous, bond premium, overhead expense, and profit, clearly do not come within the statutory terms "labor and material in the prosecution of the work provided for in said contract," and hence are not recoverable against the surety.

The district court disallowed the items for engineering and legal expenses, as the same were merely cost of preparation for the trial of this litigation. The court should have disallowed each and all items of this exhibit.

With reference to overhead expense, it is undisputed that Schaefer simultaneously had a large number of jobs in progress, all of which were handled from his Portland office. All supervision of the work on this job, including his superintendent in charge of the job, is included within his labor payroll, which covers everyone except the appellee, Schaefer himself, and he was on the job only on a few isolated, rare occasions. Even Schaefer's brother, William Schaefer, was carried on the labor payrolls of this job, at \$100.00 per week, but made only a few trips and was rarely on the job. The overhead of the Concrete Construction Company in Portland was therefore during that period extraordinarily high.

The district court therefore clearly erred in allowing recovery of these various items against the surety.

## VI.

### 6. APPELLANT IS ENTITLED TO ADDITIONAL ATTORNEYS' FEES ON THIS APPEAL.

As hereinabove stated, the Macris and their silent partners, Goerig and Philp, are liable to this appellant on the application for the bond (Casualty Co. Ex. 10) for additional reasonable attorneys' fees, which should be fixed by this court for legal services on this appeal.

We submit that \$5000.00 is a reasonable sum to be allowed this appellant for reasonable attorneys' fees for services on this appeal, in view of the voluminous size of the record, the extensive services required, and the large amount involved.

It is well settled that federal appellate courts may, and customarily do, allow such recovery of additional reasonable attorneys' fees for services on appeal. For example, in *American Can Co. v. Ladoga Canning Co.*, (C.C.A. 7) 44 F. 2d 763, 772, certiorari denied, 282 U. S. 899, the court said:

"The District Court, however, could not and doubtless did not take into consideration the uncertain factor of a possible appeal, nor the legal services which might be rendered in case an appeal was prosecuted. Since

the judgment was entered in the District Court, defendant has taken this appeal, and plaintiff's attorneys have rendered additional necessary and substantial legal services. Plaintiff should be allowed their reasonable value, which we fix at \$3,500.

"The statute authorizing plaintiff's recovery of reasonable attorneys' fees directs their inclusion as a part of the costs. We find nothing in this statute which limits this allowance to services rendered in the District Court. Its terms are broad enough to include plaintiff's reasonable attorney's fees necessarily incurred in any court wherein the cause was pending. A similar construction has been placed on a similar statute. *Davis v. Parrington* (C.C.A.) 281 F. 10, 17; *Louisville & N. R. Co. v. Dickerson* (C.C.A.) 191 F. 705, 712.

"The decree is affirmed. The Ladoga Canning Company shall recover its costs on both appeals, including therein, as a part of the costs of this court, \$3,500, as and for its reasonable attorneys' fees."

See also to the same effect:

*Davis v. Parrington*, (C.C.A. 9) 281 F. 10, 17;

*Rigopoulous v. Kervan*, (C.C.A. 2) 140 F. 2d 506, 508.

We therefore respectfully submit that the judgment appealed from should be reversed and the cause dismissed as to this appellant, Continental Casualty Company, and that the judgment entered by the trial court in favor of this appellant against the cross-appellants for reasonable attorneys' fees and costs be affirmed, and that this appellant recover judgment against each of said cross-appellants, Macris, Goerig and Philp, jointly and severally, for its

additional reasonable attorneys' fees on this appeal in such an amount as may be fixed by this court.

Respectfully submitted,

EUGENE D. IVY  
ELWOOD HUTCHESON  
*Attorneys for Appellant*  
Continental Casualty Company.



IN THE  
**United States Circuit Court**  
**of Appeals**  
 FOR THE NINTH CIRCUIT

CONTINENTAL CASUALTY COM-  
 PANY, a corporation,

*Defendant and Appellant,*

*vs.*

THE UNITED STATES OF AMER-  
 ICA, for the use of M. C. SCHAEFER,  
 an individual doing business as CON-  
 CRETE CONSTRUCTION COM-  
 PANY,

*Plaintiff and Appellee,*

A. C. GOERIG and CLYDE PHILP,  
 individuals and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE  
 MACRI, individuals and co-partners,

*Defendants and Cross Appellants.*

No. 11707

**BRIEF OF CROSS APPELLANTS MACRI**

UPON APPEALS FROM THE DISTRICT  
 COURT OF THE UNITED STATES FOR  
 THE EASTERN DISTRICT OF WASH-  
 INGTON, SOUTHERN DIVISION

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## JURISDICTION

This action was declared by the amended complaint (Tr. 2, 10) under the Miller Act, U. S. C. A. Title 40, Secs. 270a and 270b; 49 Stat. 793, 794. It was brought in the federal district court for the district in which the federal work involved was performed. The trial court so determined (Tr. 104-5; ff. 18).

Original jurisdiction of the federal district court was neither invoked nor sustained on any other ground. The question of sufficiency of original jurisdiction of such federal district court under the Miller Act in this action is hereby raised.

Appellee Schaefer, as subcontractor, sued as use plaintiff in the name of the United States, under Sec. 270b of the Miller Act. He joined as defendants the principal contractors, Macris, their surety on the payment bond required by Sec. 270a of the Miller Act, and their joint adventurers, for a claimed balance for performances according to the subcontract terms.

This appeal by Macris from the judgment (Tr. 112-115) entered against them (Tr. 136) is pursuant to U. S. C. A. Title 28, Sec. 225; 26 Stat. 828, as amended.

The Circuit Court of Appeals order herein of March 31, 1948, limits the Macris' appeal to review of judgment pertaining to the one subcontract under Specifications 1062-1 Ex. 3, and eliminates all consideration of another subcontract under Specifications 1068.

## STATEMENT OF CASE.

## THE PIVOTAL CONTROVERSIES.

The principal contention of law made by these appellants is that where the performance of a subcontract is completed by the subcontractor without oral or written modification, in spite of repeated partial breaches thereof by the principal contractor rendering such performance more costly because of delay, and the subcontractor is paid and without protest accepts the full contract price for his performance, the subcontractor cannot thereafter recover his total cost of performance, including 20% overhead and 10% profit, on the basis of either implied contract or quasi contract; nor can he recover on *any* basis without proving the additional cost of performing the subcontract by reason of the contractor's breach, without complying with the provisions of the subcontract regarding delays, or without having made any attempt to minimize such increased costs. The district court held to the contrary.

These appellants also contend that there is no substantial evidence to support the finding of the district court that the principal contractors breached the subcontract.

## PARTIES LITIGANT.

This action was commenced by the United States for the use of M. C. Schaefer, doing business as Concrete

Construction Company. Schaefer's action was for a claimed \$57,618.87 a *quantum meruit* theory for performance of the subcontracted work after an alleged breach of the subcontract by the principal contractors.

The defendants sued were Sam Macri, Don Macri and Joe Macri, individuals and copartners doing business as Macri Company, the principal contractors; the Continental Casualty Company, a corporation, their surety on the payment bond required and delivered under Sec. 270a of the Miller Act, and the Macri Company's joint adventurers, A. C. Goerig and Clyde Philp.

Such parties litigant will hereafter be referred to, respectively, for the use plaintiff as Schaefer or appellee, for the Macris as Macris or, if referring to Sam Macri only, as Macri, for the surety as Continental, and for the co-adventurers as Goerig & Philp.

#### CONTRACT AND SUBCONTRACT DOCUMENTS.

The principal contract, numbered 12r-14825, was entered into between Macris, as principal contractors, and the United States, Department of Interior, through the Bureau of Reclamation, on December 7, 1943. The contract and the payment bond by Macris and Continental are Ex. 1. The public work involved was performance of earth work, pipelines and structures, Laterals 59.3 to 69.8 and sublaterals, Roza Divi-

sion, Yakima Project, Washington. That work is variously referred to herein as the Roza Project, as job 1062-1 or 1062, Schedule 1, or job 1062. The Bureau of Reclamation and its representatives are likewise referred to as the "government" and "government officers."

The specifications governing the contracted job work are Ex. 3. At the front thereof, at pages 3 to 5, are shown the 28 items of estimated quantities bid by Macris to a total of \$128,550.95 as the estimated contract amount. Such specifications are designated as Specifications 1062-Schedule 1.

The Schaefer subcontract is Ex. 5. It is dated March 14, 1944, and calls for performance of only 2 items (of the 28 items bid by Macris), namely: Item 12, placing an estimated 1515 cubic yards of concrete; and item 13, placing an estimated 12,700 pounds of reinforcing bars. Item 15, erecting an estimated 10,000 board feet measure of timber in structures was an extra work item, paid for as such and is not here involved. Schaefer's bid for performance of such 2 items was \$26.00 per cubic yard of concrete installed (Ex. 5, Art. Two, Sec. 1, or an estimated total of \$39,390.00.

A preliminary field inspection and study of contract documents by Schaefer are vouched for, to make the subcontract the whole agreement, by the following



provisions thereof at Sec. 15, Article Three (on the last page of Ex. 5):

*“Contains Entire Agreement. 15:* The Subcontractor has satisfied himself by his own investigation and research, regarding all of the conditions affecting the work and as to the meaning and intention of the plans and specifications referred to herein, and has executed this agreement solely in reliance upon his own investigations, independent of any estimate or other information prepared or furnished by the Owner or by the Principal Contractor. This instrument contains the entire agreement of the parties hereto and no estimate, bid or proposal of the Subcontractor, and no statement, promise, verbal or other agreement not contained herein shall, in any manner, affect or modify any of the terms or provisions herein contained.”

A companion responsibility on Schaefer as subcontractor is contained in Sec. 18, Article One (on the third page of Ex. 5):

*“Lines, Grades and Measurements. 18:* Assume full responsibility for the accuracy of all lines, levels and measurements and their relation to bench marks, property lines, reference lines and the work of the Principal Contractor and of other contractors, or subcontractors. In all cases where dimensions are governed by conditions already established the responsibility for correct knowledge of such conditions shall rest entirely on the Subcontractor. No variation from specified lines or grades or dimensions shall be made except on the written authority of the Principal Contractor. All work shall be made to conform to actual, final conditions as the same develop in the course of

construction and the Subcontractor shall make due allowances for all of these."

That responsibility is coordinated with the additional Schaefer responsibility in Sec. 7, Article One (on the second page of Ex. 5):

*"Plans and Specifications, Cooperation and Conformance. 7:* Conform strictly to all plans and specifications, approved shop drawings and to any subsequent modifications of all thereof, in accordance with their true intent and meaning. Perform all work and furnish all materials called for in the specifications and not shown on the plans, or shown on the plans and not called for in the specifications, the same as though both shown and called for, as plans and specifications shall be considered as cooperative. All provisions of the specifications affecting said work or materials in any manner, and all requirements of the plans shall be fully complied with the same as if contained in this agreement, except in so far as said provisions are specifically modified or superseded by this agreement."

It was also a subcontract obligation to submit progress schedules *and reports* relating to the work, when, as testified by Schaefer, Macri at the field meeting of April 15, 1945 (hereinafter discussed) told Schaefer to send Macris any bills for any extra work. That is provided for in Sec. 3, Article One (on second page of Ex. 5):

*"Shop Details, Erection Plans. 3: Prepare and submit in such form, and at such times as the Principal Contractor may require, all details, shop*

*drawings, setting plans, progress schedules and reports relating to the work."* (Italics ours.)

The means by which a subcontractor can designate or have adjusted any type of construction errors, giving Schaefer the means by written notice within 10 days after subcontract execution of specifying and having determined the type of excavation and of fine grading for his work, is found at Sec. 6, Article One (on the second page of Ex. 5):

*"Ambiguities, Conflicts and Discrepancies. 6: Immediately examine all plans and specifications and all changes and modifications thereof. In case there be any ambiguity, error, discrepancy or conflict in or between this agreement, the plans, the specifications and the addenda, or, in case the Subcontractor feels that any work or materials shown or specified are unsuitable for the use intended, he shall immediately give written notice thereof to the Principal Contractor. In the absence of such notice within ten days from the date hereof, and with respect to any changes or modifications within ten days of the date thereof, the plans and specifications and the changes and modifications, as the case may be, shall be deemed to have been accepted by the Subcontractor and he thereby assumes the full responsibility of the Principal Contractor for all ambiguities, errors, discrepancies and conflicts which may exist with respect to the work and for the replacement of any unsuitable work or materials even though they comply with the plans and specifications. If there be any ambiguities, errors or discrepancies or conflicts, or if unsuitable work or materials be called for by the plans and specifications the matter shall be referred to the Principal Contractor for deter-*

mination and its ruling shall be final and conclusive. *If the Subcontractor shall have given notice thereof as in this agreement provided*, then the Principal Contractor (subject to the rights of arbitration as in this agreement provided) shall determine the amounts, if any, of any addition to or deduction from the contract price resulting therefrom, and in arriving at its conclusions shall give precedence to the documents involved in the following order: this agreement; the general conditions of the specifications; the specifications and any addenda to these specifications; the full size detail drawings; the large scale drawings; the small scale drawings; the general design drawings." (Italics ours.)

*No such notice was given* (Tr. 1452).

Sec. 9 of Article One of such Ex. 5 (also on the second page thereof under the heading "Cooperate with other Subcontractors") provides for 5 days' written notice of any cause for delays in progress of the work by other contract operators, such notice to be given by Schaefer to the Macris as principal contractor. That provision states, for the pertinent third and fourth sentences thereof, as follows:

"\* \* \* The Subcontractor shall not be entitled to any damages or additional compensation arising from, or *because of* any reasonable orders given or *acts done by the Principal Contractor* for the purpose of coordinating the work of all contractors, subcontractors and material men. *If the Subcontractor shall be delayed* in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused;



*provided, however, that written notice of the fact and cause of such delay be given by the Subcontractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. \* \* \**

(Italics ours.)

*No such notice was given (Tr. 1452).*

Sec. 3 of Article Three of such Ex. 5 (on the fourth page thereof) provides for extra compensation for changes, alterations and additions. The second paragraph of such section provides pertinently:

“Should any such alteration or deduction involve a change in the quantity or quality or cost of the work required by the terms of this agreement, proper adjustment shall be made in the contract price. In all such cases, the amount to be allowed for such changes shall be determined by the Principal Contractor in advance of the doing of any such work and the decision of the Principal Contractor as to the amount to be allowed therefor shall be final and conclusive between the parties hereto, subject to the right of arbitration as provided herein. No claim for extra compensation on account of any changes shall, however, be allowed unless the same shall have been ordered in writing by the Principal Contractor specifying the price or rate thereof.”

*No written notice from Schaefer, as subcontractor, was ever given (Tr. 1452).*

Sec. 5 of Article Three of such Ex. 5 (on the fourth page under the heading of “Delays”) reads for the



pertinent context as follows:

“If the work hereunder shall be delayed by any *act, neglect or default* of the owner or of the *principal contractor*, or of any other contractor employed by the Owner or the Principal Contractor upon the entire work, \* \* \* through no fault of the Subcontractor then the time herein fixed for completion of the work shall be extended for a period equivalent to the time lost by any or all of the reasons aforesaid; provided, however, that no such extension of time shall be made or allowed unless the Subcontractor shall give the Principal Contractor *notice, in writing, within five days* after the occurrence of any such act, omission or event, specifying the fact and cause of the delay. \* \* \*”  
(Italics ours.)

*No such notice was ever given (Tr. 1452).*

#### JOB FACTS.

The whole contracted operation for job 1062-1 was a continuing ditch line and feeder ditches for the main laterals and sublaterals to conduct irrigation water along its course on the Roza Project. At the locations in that course where a structure was indicated to be installed for diversion of the water into a sublateral ditch or for an undercrossing of a road, there would be involved, differently than for the main ditching, an excavation for a structure (a Macri item), the installation of a concrete structure (a Schaefer item) and the backfilling and puddling around the completed concrete structure (a Macri item).

The whole course is shown on the map following

page 36 of the specifications (Ex. 3). The distance of the Macris' work involved in job 1062, Schedule 1 (Ex. 3, p. 3) is  $10\frac{1}{2}$  miles (Mile 59.3 to Mile 69.8), plus the sublaterals (Tr. 1493, 1494.)

Along this vast network of ditching were 549 concrete structures, including 28 standard weir walls (or 521 box structures net) (Tr. 562). These were a Schaefer subcontract item.

The concrete structures on this job are of the same type as other reclamation project structures throughout the whole Roza Project—a *vast majority thereof being small or box structures* with a maximum depth of 3 feet (Tr. 1783). The number of such box structures shown on the plans, after eliminating duplications and those indicated but not shown, is 368.

Such 368 box structures were classified by the former Bureau of Reclamation engineer Hance (Tr. 1901-3) into five groups, namely:

No. of Structures			% of the 368	Minimum to Maximum Headwall Height
1.	23	or	6.2%	$1\frac{1}{2}$ feet to 2 feet
2.	152	or	41.4%	$2\frac{1}{2}$ feet to 3 feet
3.	101	or	27.5%	$3\frac{1}{2}$ feet to $4\frac{1}{2}$ feet
4.	54	or	14.6%	$4\frac{1}{2}$ feet to $5\frac{1}{2}$ feet
5.	38	or	10.3%	Greater than $5\frac{1}{2}$ feet

Groups 1, 2 and 3, or 74% of the 368 structures, i. e.,

at least 262 structures, had a headwall of less than 41½ feet and a depth below ground surface of about 31½ feet (Tr. 1903).

Access to remove the fasteners—shown by Ex. 44—from the top of the outside wall was available for at least those 262 structures (Tr. 1902-3). *The maximum distance down* for an operator to reach in order to fasten the forms together *was 2 feet 6 inches* (Tr. 1783).

Schaefer's first job superintendent, Waltie, testified that the average depth of the holes was 4 feet (Tr. 719). Schaefer's cement crew foreman Holmes said the excavations averaged 3 feet to 4 feet (Tr. 751). The above tabulation as thus supported by Schaefer testimony was not controverted throughout trial.

Schaefer, after signing the subcontract (Ex. 5) on March 14, 1944, went on to job 1062 on March 16 and 17 and again on April 12, 1944. *Intermediately Schaefer sent no written notice of any kind to Macris* (Tr. 1452).

On April 21, 1944, Schaefer signed at Seattle an additional subcontract (Ex. 6) for similar performance of Macris' second and adjoining prime contract under Specifications 1068. He was next on job 1062 on April 27 through April 29, 1944 (Tr. 366).

On April 28, 1944, Schaefer insisted to Macris' superintendent Staples that Macris be on the job by noon of April 29 and agree to things as Schaefer demanded or that Schaefer would "pull off the job" (Tr. 215).

No provision was asked or inserted by Schaefer in either of the Schaefer subcontracts about width of structure excavations, slope of banks, fine grading, lumber or roads (Ex. 5; Ex. 6). Schafer gave no written notice of any desired change in Ex. 5, as called for by its terms, although Macris' superintendent Staples had discussed details of excavations with Schaefer's job superintendent Waltie and general superintendent, W. E. Schaefer (Tr. 1742-3-4).

Schaefer in his case in chief stated that on April 18, 1944—the first time he himself saw Macris' excavations—(Tr. 205): "The excavations were made vertical. There was no one to one slope. They were made tight.\* \* \*" He testified that "we had set a few structures." Schaefer also told the court that the lumber was wet, causing shrinkage (Tr. 214).

Yet, on April 21, 1944—three days later—Schaefer *did not* make any provision in the second subcontract he signed on that day (Ex. 6) for wider cuts or any slope or fine grading details or lumber specifications. He did not even notify Macris in writing—as called

for by his first subcontract—that he wanted any such change in operations in that subcontract (Ex. 5).

Much controversial testimony at trial pertains to two meetings between Schaefer and Macri on the job on April 29, 1944, and on June 15, 1944, and as to what, if anything, was changed as subcontract responsibilities at such meetings.

Schaefer at the time of the April 29, 1944, meeting with Macri had not yet placed any concrete although forms had been set for receiving concrete and 665 sacks of cement had been delivered to him (Tr. 2143).

Although Schaefer had received 665 sacks of cement from the government and had a small and adequate Jaeger concrete mixer in Portland and although he had the forms set, *he had placed no concrete*. He did not use that cement until late July 1944 (Tr. 2143, 1715, 222).

Schaefer had no concrete-placing equipment on the Roza Project in April 1944 or at all until late July 1944 (Tr. 392). The only equipment he had on job 1062 until the end of July 1944 was a power skill saw, a band saw, a table saw, pick-ups and one truck (Tr. 2191). Macris had furnished Schaefer, without charge and although not required by the subcontract, the job office, form panels already built and 8 or 10 kegs of nails toward cooperation to get Schaefer started (Tr.



1675-6-7).

Schaefer testified that at the April 29, 1944, meeting Macri said he would pay Schaefer for the extra work done, *upon Schaefer sending Macris the bill for that work*. (Tr. 224, 226). No bill for any such extras was sent by Schaefer to Macris (Tr. 1471).

Preceding the June 15, 1944, meeting Schaefer had kept *only two* men on the job after May 3, 1944. He had his job superintendent Waltie absent in Portland after May 24, 1944 (Tr. 1774). The crew said they "had pulled off the job" (Tr. 1774). Waltie himself testified (Tr. 702): "I was actively in charge of the job but we weren't there." He also stated he was in Portland working on another job (Tr. 702).

At the June 15, 1944, meeting with Macri, Schaefer still had his crew and his equipment in the Portland area (Tr. 702).

On the occasions of the April and the June meetings with Macri, Schaefer dictated what he would do and the conditions on which he would do so. On each occasion Schaefer wholly disregarded the above quoted subcontract provisions. At neither meeting did Schaefer extend any new or additional service or consideration or anything that was not already incumbent on him by the subcontract terms (Ex. 5). Both meetings were forced on Macri by Schaefer on

a basis of "be there, or else" he would block Macris' principal contract completion.

That principal contract (Ex. 3, p. 14, pars. 23-24) specified \$25.00 per day as liquidated damages for delayed performance beyond the contract allotted time of 400 days.

Ex. 14—the government's progress and final estimates—shows such liquidated damages deducted from Macris' earnings as follows: Estimate No. 11—month of February, 1945, for 17 days, \$425.00; No. 12—month of March, 1945, for 28 days, \$700.00; and No. 13—final estimate, for 6 additional days in March, \$150.00; or a total of \$1,275.00 for 51 days' delay. The Schaefer crew was effectively off the job from May 4, 1944 (Tr. 1774) until resuming work on July 29, 1944 (Tr. 1087, 1715)—for a time of subcontract non-performance considerably in excess of the 51 days of overtime for which Macris were penalized.

Schaefer had over 200 other jobs in progress in the Portland area during the same period for which he had subcontracted performance of job 1062 (Tr. 373). His concrete-placing equipment was used in Portland until the end of July 1944 (Tr. 373, 392). His 1062 job superintendent Waltie worked on another job at Portland after May 24, 1944 (Tr. 702, 1774). Schaefer himself was there "attending to business back in

Portland'' (Tr. 372). His crew for the Roza job was in Portland after May 3, 1944 (Tr. 1774), 192 miles away from the Roza job (Tr. 569). All of this was at the height of the construction season.

When Schaefer did resume his subcontract work on job 1062 and *began* placing concrete at the very end of July 1944 (Tr. 1087, 1715) he had passed the best construction months. He had to perform that period's work during the following months and into the winter months. His witness Bufton testified it is always "disastrous" to carry a construction job through the winter (Tr. 1176).

Schaefer took over the subcontracted portion of job 1062, Schedule 1, as of March 14, 1944 (Tr. 202). He finally completed that portion at the very end of March 1945 (Tr. 522, 1531).

Schaefer accepted and cashed the monthly checks—with voucher parts thereof specifying subcontracted work performed (Exs. 99, 127, 128) without notice of any disagreement therewith. This was done monthly after the meeting with Macri on the job June 15, 1944, as well as before. Likewise, Schaefer ordered payments to his creditors by Macris against earned subcontract balance. Similarly he made written application on December 5, 1944 (Ex. 124), to invoke the arbitration provisions contained in the Schaefer sub-

contract (Ex. 5, at Art. Three, Sec. 9), but did not follow through with the directions therein given. Likewise, Schaefer received a letter from the Bureau of Reclamation, dated June 27, 1945 (Ex. 37), addressed to him as subcontractor without disavowing that continuing relationship as subcontractor either to the Bureau of Reclamation or to Macris.

(Arbitration prerequisite to suit was waived by Macris at pre-trial conference in order to get trial under way (Tr. 78).)

The official Bureau of Reclamation record of actual job performance is in evidence in a series of government inspectors' field reports, which were *made daily as the field work progressed* (Ex. 13, for respective subnumbers indicated below), also in the government concrete engineer's communication (Ex. 17a), in the job progress and final estimates (Ex. 14), in the government's official communications to Macris of Septemebr 18, 1944 (Ex. 39), with copy to Schaefer and of January 25, 1945, to Schaefer (Ex. 37), and in the context of the deposition of H. T. Nelson, the government engineer in charge throughout performance of job 1062 (Tr. 1490, 1534).

Nelson's deposition was taken at Boise, Idaho, during a trial interim (Tr. 1499), after he telegraphed during trial he was prevented from attending (Tr.

207). The deposition was secured only after continued persistence at trial by the Macris (Tr. 235, 1089 to 1101). It was finally authorized by the court upon condition that the expenses of attendance for Schaefer's attorneys be imposed on Macris (Tr. 1098). This deposition is reported at Tr. 1489-1551. It was read to the court in its entirety, but it is not mentioned in the court's opinion (Tr. 2208-2230). This Nelson deposition (Tr. 1489-1551) contains a dependable, basic grasp of the scope of work and how it progressed.

Nelson in such deposition, at Tr. 1512-14, identifies the five official government inspectors who were in the field and made daily written reports of job performance. Such reports in their entireties were produced at trial. The portions admitted for such respective inspectors are: J. S. Heers, Exs. 13a, b and c; R. M. Moorhead, Exs. 13d-13l; J. R. Reynolds, Ex. 13m and subnumbers; M. Sektnan, Ex. 13-o and subnumbers; and J. A. Costello, Ex. 13n. This Nelson deposition testimony and such current written reports state exact conditions as they progressed on the job. They are an official recounting of unprejudiced facts about the job itself.

Nelson talked with Schaefer at the Bureau of Reclamation office and in the field with Schaefer's second



superintendent Darcy about excavations for structures and government basis of payment therefor, while such excavation work was in progress (Tr. 1526).

No written notice from Schaefer to Macri about excavations, however, was ever given, although called for by the subcontract (Ex. 5), in case any change was desired or any extra compensation was to be claimed (Tr. 1452).

Nelson, as the government engineer in charge, was asked on cross-examination about excavations, and answered (Tr. 1538):

“Q. It is also a fact, is it not, Mr. Nelson, that in order for the Concrete Construction Company to assemble and place its structure forms in the excavation, it was necessary that the excavation itself first be completed, so as to receive the structure forms?”

“A. It's necessary that the hole be large enough to accommodate the form, yes.”

Similarly, still on cross-examination, Nelson testified about subgrade (Tr. 1538-9):

“Q. And if the sub-elevation or subgrade was too low, that in each instance would require additional concrete so that the completed floor of the concrete structure was brought to the required grade as required by your grade lay-out plans?”

“A. Yes, *except that the field inspectors were under instructions to watch for excessive over-excavation*, in which case compaction could be required, thus bringing the subgrade back to grade,

in lieu of the more expensive way of filling by use of concrete. \* \* \*

“Q. And that again would have to be done before your field inspectors would permit the pouring of the concrete in the structures?

“A. Yes. *I am not saying that that occurred*; I am saying that that would be our requirement, if what you say is correct.” (Italics ours.)

Nelson further testified, when he had been asked whether there had to be “a considerable hand excavation” before setting forms, as follows (Tr. 1542-3):

“Q. Now, in the excavation of these structure holes, in addition to the rough excavation which could be done by a shovel, there had to be considerable hand excavation before the forms could be installed and the concrete poured; isn’t that true?

“A. Yes. *I wouldn’t say as to relative amounts. I would say in every case there is a certain amount of required hand-trimming, especially in corners that cannot be reached by a machine, and in narrow headwalls, and in cut-off walls, below grade.*” (Italics ours.)

Nelson further stated, still on cross-examination, as to head-wall excavations, at Tr. 1543-4, as follows:

“A. \* \* \* *I might say we try to encourage holding the excavation of head-walls down to the minimum widths, if we could, because the backfill was objectionable to us. We preferred the natural ground to backfill, if it were possible to obtain.*” (Italics ours.)

On direct examination Nelson established that the

exactions of the government as to absolute compliance with the lay-out details (Ex. 12) was not expected in measuring for pay quantities. His statement is found at Tr. 1544-5:

“Q. Mr. Nelson, in measuring for pay quantity on Specification 1062-1, was complete compliance with the measurements as indicated on the structure lay-out drawings required, as against the complete adaptability of the structure to the purpose of the project? \* \* \*

“A. We insisted upon full compliance to the lines and grades *insofar as they might affect the hydraulic properties of the structure*. However, we did encourage the carpenter foreman of our various contracts to standardize if it was possible, possible for them to do so. \* \* \* And *we found it undesirable to consider those lay-out drawings as too rigid*, except insofar as hydraulic properties were concerned, because different contractors had different ideas as to how they were going to perform this construction.” (Italics ours.)

Nelson testified with respect to the lumber scarcity and job readjustment accordingly at that time (Tr. 1528-9):

“A. I certainly am not an expert on the national lumber situation. I can say, however, that in all our experience with all our contractors on the project at that time, shortage of lumber was very pronounced on every contract. \* \* \*

“Q. Can you tell me whether or not there were any less restrictive requirements by the Bureau of Reclamation as to grades of lumber or moisture content of lumber, during the period covered in

performance of Specification 1062-1 than previously? \* \* \*

“A. The restrictions are always as provided for in the specifications, but our enforcement of those restrictions was tempered by conditions prevailing at that time; in other words, we did not strictly enforce those provisions.”

That national shortage of lumber was further established by Schaefer's own witnesses at trial: Tr. 389, M. C. Schaefer; Tr. 641, Stickney; Tr. 800, Mercille; Tr. 1124, W. E. Schaefer; and Tr. 1179, 1210, Bufton. Similar national lumber acuteness was established by defense witnesses: Tr. 1817, Anderson; Tr. 1853, Ashley; Tr. 2052, 2058, Klugg. *No witness denied the national lumber shortage.* Schaefer did not buy any lumber himself (Tr. 394).

Nelson also established that Schaefer's second job superintendent Darcy, while he constantly complained, was never stopped by shortage of lumber (Tr. 1530, 1532-4).

*Macri had no written notice about any insufficiency of lumber* (Tr. 1595).

The Bureau of Reclamation did not make demands for any of the exactions or niceties regarding excavation for structures, fine grading of structures or lumber quality, which Schaefer directly, and through his first job foreman Waltie and his second job foreman

Darcy, detailed in court as Macri's shortcomings.

Macris did not receive any written notice from Schaefer, as called for by Ex. 5. Macri did not receive any notice from the government about any excavations (Tr. 1589-90) or lumber (Tr. 1595).

The trial court opinion states, with respect to the lack of meeting of the minds between Schaefer and Macri at either the April or June 1944 meetings, as follows (Tr. 2214-15):

“ \* \* \* the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn't consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.”

In spite of this finding, however, the court then held (Tr. 2215):

“ \* \* \* it is the view of the court that there was



an implied contract, or perhaps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macris's breach" (id. Tr. 108; ff. 15),

Schaefer sued Macris, their surety Continental, and their co-adventurers, Goerig & Philp, alleging a substitute oral contract, for the written subcontract (Ex. 5), to pay Schaefer all expenses for performance of the work called for by Ex. 5, and, in the alternative, for paying Schaefer the reasonable value of all his services. He sued for \$57,618.87 in addition to the \$32,614.66 he had received as subcontract progress payments from Macris (Ex. 8). The district court found that Macris had been guilty of a continuing breach of the subcontract in these particulars: Lack of reasonable clearance in and delayed furnishing of structure excavations to enable Schaefer to proceed with prompt progress (ff. 12; Tr. 100-1); defective fine grading of structure excavations, increasing Schaefer's work and hindering and interfering with his progress (ff. 12; Tr. 101) and insufficient quantities and qualities of lumber, and that lumber was not timely furnished (ff. 13; Tr. 101-2).

The district court judgment against Macris in favor of Schaefer was for \$56,764.97, principal amount, plus

interest and costs (Tr. 113), in addition to the \$32,614.66 he had received from Macris on current estimate payments (Ex. 14, monthly estimates). It also awarded *unqualifiedly, instead of conditionally* through payment to Schaefer, a judgment against Macris in favor of Continental for an additional \$56,764.97, plus \$1,750.00 attorneys' fees.

The judgment did not make any provision for protection of the Macris against the levy by the United States (Ex. 67; Tr. 34, par. 6; Tr. 40-46) for asserted collection and nonpayment by Schaefer of withholding tax, employment tax F. I. C. A., employment tax F. U. T. A., and income tax.

The total amount of all earnings at Macri bid units for the 2 items subcontracted by Schaefer, namely, Items 12 and 13, and with Item 15 as an extra work item of 1062-1, was \$48,915.07 (Ex. 61; Items 12, 13 and 15). All earnings on the only Macri items correlated to the said Schaefer items were Item 7, excavation, common for structures, \$3,756.25, Item 8, excavation, rock for structures, \$739.20, Item 9, backfill against structures, \$1,863.00, Item 10, puddling and tamping backfill, \$2,035.68 (Ex. 61; Items 7, 8, 9 and 10). These totaled \$7,694.13. *The court's judgment amount of \$56,764.97 is, therefore, more than 7½ times the total earnings of all Macris' items (Items 7, 8, 9*

*and 10) correlated to the items subcontracted by Schaefer.*

The Schaefer subcontract items and such 4 Macri items combined totaled \$56,609.20 (Ex. 61; Items 7, 8, 9, 10, 12, 13 and 15) as against the judgment award to Schaefer of \$56,764.97, plus the \$32,614.66 previously paid to him, to total \$89,379.63, or \$32,770.43 more than the total earned in both the said Schaefer items and the said Macri correlated items. *Yet, Macris, but not Schaefer, performed all of the correlated Items 7, 8, 9 and 10.*

The district court arrived at its judgment figure in favor of Schaefer by taking the alleged summary of Schaefer's costs without admitting Schaefer's books and accounts, after deducting from the total of \$90,-223.53 of such summary only certain small items of Schaefer trial preparation expense and the like, but charging both overhead and profit items (Tr. 1241-2, 1252-1264).

In connection therewith we respectfully refer this appellate court to pages 20-22 of the brief of Continental Casualty Company covering the testimony of appellant's accountant Hendershott, the full context of which portion of such pages we here adopt by reference to establish that the Hendershott compilation (Ex. 63)—used as a basis by the district court for its

judgment—was made without either a segregation on Schaefer's books or without any attempt by Hendershott to make independent segregation for such accounting.

Further, in connection therewith and for the purpose of establishing that Schaefer intentionally kept no costs of any additional work and that he made no billing of any such costs to Macri, we respectfully refer this appellate court to pages 13-17, inclusive, of the said Continental brief, the full context of which pages we here adopt by reference.

#### THE JUDGMENT.

Trial was by the court without a jury, after use plaintiff's demand for jury was waived. At conclusion the court announced decision (Tr. 2208-30), later made findings of fact and conclusions of law (Tr. 94-111), and on May 1, 1947, entered judgment for aforesaid \$56,764.97, plus 6% interest from judgment date and \$921.70 costs, in Schaefer's favor against Macris and their surety, Continental; and also judgment in favor of Continental against Macris, unconditionally instead of qualifiedly collectible only upon payment to Schaefer by Continental, for the sum of \$56,764.97, for like interest and for \$1,750.00 attorneys' fees (Tr. 112-115). Other features of the judgment pertain to Macris' cross-complaint, Goerig & Philp's

cross-complaint and to Specifications 1068, which are not now involved in the Macris' appeal by reason of the aforesaid Circuit Court of Appeals' order of March 31, 1948.

Macris defended at trial, on the grounds which will be urged on this appeal and which are set forth herein under their "Summary of Argument."

### SPECIFICATIONS OF ERRORS.

The district court erred:

1. In denying additional appellants Macris' motion for dismissal of the action pertaining to Specification 1062-1 at the close of the use plaintiff's case in chief (Tr. 1374-5).

2. In denying these additional appellants' motion for dismissal of action pertaining to Specification 1062-1 at the close of all the evidence (Tr. 2205).

3. In rejecting the Schaefer books and claimed original entries of the subcontract job account when offered in evidence by Schaefer without objection by Macris but objected to by Goerig & Philp upon wholly insufficient legal grounds. The rejected exhibits (which Schaefer immediately withdrew) were numbered 52, 53 and 53a to 53h, inclusive, and were the purported books and records of original entries upon which Ex. 63 (the Hendershott compilation on



which the district court based its judgment amount) could possibly be founded. The record on this is found at Tr. 2201-2, where, when offered "for the purpose of the record," the following occurred (Tr. 2202):

"The Court: Do you have an objection?

"Mr. Holman: No objection, your Honor.

"The Court: I question again that all of those things should go in here. We've got a record that's going to be tremendously voluminous, and, of course, I suppose you don't have to take up any more of this than you want to on appeal.

"Mr. Hawkins: Well, I'll make an objection. I haven't really examined those documents, I don't know what's in them, but I do know that there is a certain amount of self-serving statements in there, so I'll interpose an objection on those.

"The Court: The objection will be sustained. We seem to have difficulty getting an objection here. It was quite the reverse at the beginning of the trial."

This was confiscatory of additional appellants' inherent rights to have the proffered exhibits remain available for argument and for review on this appeal.

4. In making finding of fact No. 12 and the whole thereof (Tr. 100-1) and specifically in finding therein that the "clearance reasonably required where a form had to be placed between the concrete and the bank" needed "a slope of one to one on the bank", because such finding of fact is contrary to any substantial evidence and contrary to the requirements of job 1062

specifications (Ex. 3).

5. Further, in making said finding of fact No. 12, for the second paragraph thereof (Tr. 101), and specifically in finding therein that Macris “failed to do the fine grading *in accordance with the lay-out plans and specifications,*” because the same is contrary to any substantial evidence, to the provisions of job 1062 specifications (Ex. 3) and to the terms of the subcontract (Ex. 5). (Italics ours.)

6. In making finding of fact No. 13, and the whole thereof (Tr. 101-2) on the ground and for the reason that it is contrary to any substantial evidence.

7. In making finding of fact No. 14, and the whole thereof (Tr. 102), and specifically in finding therein that Macris “breached their subcontract” and that the breach so found “was wilful and negligent” and “was a continuing breach,” because the same is contrary to law, to any substantial evidence to job specification 1062 (Ex. 3) and to the terms of the subcontract (Ex. 5).

8. In making finding of fact No. 15 (Tr. 102-3), and the whole thereof, and specifically in finding that “there was an implied agreement or a quasi-contract” between Macris and Schaefer to provide that Schaefer “was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra

burdens'' imposed upon Schaefer by Macris, because the same is contrary to law, to any substantial evidence, to the provisions of job specification 1062-1 (Ex. 3) and to the terms of the subcontract (Ex. 5).

9. In making finding of fact No. 16, and the whole thereof (Tr. 103-4), and specifically in finding therein that labor, materials and services furnished by Schaefer were of a reasonable cost and value of \$89,498.71 or any other sum (except the subcontract price of \$26.00 per cubic yard for 1356.697 cubic yards of concrete placed under Item 12, as shown by job 1062 final estimate (Ex. 61), amounting to \$34,974.03 gross earnings, less therefrom the sum of \$32,614.66 paid thereon under job 1062 progress and final estimates (Item 12 on Ex. 14), but subject to United States Treasury Department levy under Ex. 67 as found by finding of fact No. 20 at Tr. 105), because said finding of fact No. 16, and the whole thereof, and specifically the aforesaid part thereof, is contrary to law, to any substantial evidence, to the provisions of job 1062-1 specifications (Ex. 3) and to the terms of the subcontract (Ex. 5).

10. In making conclusion of law No. 1 (Tr. 109-110) that Schaefer should recover judgment against Macris in the sum of \$56,764.97 and interest and costs, or any other sum (except for the amount of balance made

subject to the United States Treasury Department levy as above specified in specifications of errors No. 9 and here incorporated by reference), because Macris are not liable for more than the agreed subcontract price, and because the said conclusion is contrary to law, to the provisions of Specifications 1062-1 (Ex. 3) and to the terms of the subcontract (Ex. 5).

11. In making conclusion of law No. 3, and the whole thereof (Tr. 110), against Macris in the amount of \$56,764.97, or for any other sum, with interest and attorneys' fees, as an unconditional judgment in favor of appellant Continental, instead of as conditioned upon prior payment by Continental to Schaefer of the amount before becoming effective against Macris, because the same as entered is contrary to law, to the provisions of Specifications 1062-1 (Ex. 3) and particularly of Sec. 1, subdivision b on page 9 of Ex. 3, and to the terms of the subcontract (Ex. 5).

12. In making conclusion of law No. 8 (Tr. 111) as based on finding of fact No. 2 (Tr. 95) and on Ex. 59 mentioned in said finding of fact No. 2, because Schaefer did not timely file a certificate of assumed trade name as Concrete Construction Company in the county and district in the State of Washington in which the public work involved was performed (Tr. 140, 179, 180, 670-673).

13. In failing to grant Macris' motion to dismiss

Schaefer's action for failure to file certificate of assumed trade name of Concrete Construction Company until after the commencement of trial (Tr. 179) and until after motion to dismiss for want of such compliance had been interposed by Macris (Tr. 140, 179, 180, 670-673).

14. In entering any judgment in favor of Schaefer because Schaefer had failed to comply with Sec. 9976-9980, and particularly Sec. 9980, Rem. Rev. Stat. of Washington, pertaining to prerequisite filing of Schaefer's assumed trade name of Concrete Construction Company before bringing any action (Tr. 140, 179, 180, 670-673).

15. In entering judgment (Tr. 113) in favor of Schaefer against Macris for the sum of \$56,764.97 and interest and costs, or any other sum (except for the amount of balance and subject to the United States Treasury Department levy as above specified in specifications of error No. 9 and here incorporated by reference).

16. In entering judgment (Tr. 114) in favor of appellant Continental against Macris for the sum of \$56,764.97 and interest and attorneys' fees, or for any other sum in the manner unconditionally provided in said judgment, because any amount of judgment in favor of said Continental should be qualifiedly limited



and made subject to a prior payment by Continental to Schaefer of the amount of judgment in favor of Schaefer specified in said judgment.

17. In failing to provide in the judgment (Tr. 112-5) for any protection for Macris against the United States Treasury Department levy against any funds due Schaefer by Macris (Ex. 67) for amounts claimed collected by Schaefer and due the United States for withholding tax, employment tax F.I.C.A., employment tax F.U.T.A. and income tax (Tr. 40-46), after the district court had made finding of fact No. 20 (Tr. 105) that such levy and claim had been made and had also made conclusion of law No. 7 (Tr. 111) that "the judgment of the use plaintiff to be entered herein shall be subject" to such lien, because the omission of such protection to Macris is contrary to law, is contrary to said finding of fact No. 20, to said conclusion of law No. 7 and the court's oral pronouncement (Tr. 2227).

18. In entering any judgment against Macris in favor of Schaefer because the relationship between Macris and Schaefer were contractual and were based on written contract and subcontract in evidence as Exs. 1, 3 and 5, which contract and subcontract were not in any manner abrogated, superseded or rendered nugatory (Tr. 138-9).

19. In entering any judgment against Macris in favor of Schaefer under Specifications 1062-1 for the reason that there was a failure of any competent proof of any amount to support the judgment entered in favor of Schaefer (Tr. 138-9).

20. In concluding and holding that Macris are liable for any claimed overhead costs to Schaefer (Tr. 2222) and any asserted loss of profits to Schaefer as subcontractor on job 1062-1, on *quantum meruit* basis or any other basis without complete proof thereof.

21. In failing and refusing to determine that any sum other than \$34,974.03, gross earnings, as represented by 1356.697 cubic yards of concrete placed at \$26.00 per cubic yard as the subcontract price (Ex. 5) less all payments made thereon by Macris to Schaefer, is the amount payable to Schaefer by Macris, subject, however, to such unpaid balance being first freed from the United States Treasury Department notice of levy for funds withheld from the United States by Schaefer as shown by Ex. 67.

## ARGUMENT

### SUMMARY OF ARGUMENT.

1. Any breaches of the subcontract by Macris were partial breaches only, not a total breach, as the same were so treated by Schaefer. Therefore, the subcontract continued in existence, was performed, and could

not, at the will of the subcontractor, be terminated after complete performance thereof.

2. Schaefer is not entitled to recover the alleged reasonable value of his performance of the subcontract as measured by his total cost, including profit and overhead, on the basis of either implied contract or *quasi contract*. An *implied contract* cannot be raised contrary to the express terms of a written contract or contrary to the conduct and oral declarations of the parties. The right to rescind an express contract and recover on *quasi contract* for the reasonable value of wages and materials is available only in the case of a total breach of contract.

3. Schaefer's right of action, if any, is an action for damages for partial breach of contract. The proper measure of damages is the increased cost of performance of the subcontract resulting from Macris' alleged failures. The burden of proof is on Schaefer to prove his damages, and such increased cost of performance was not proven. The action should have been dismissed or nominal damages only allowed.

4. The alleged failures of Macris were only delay factors. Schaefer is not entitled to recover therefor under the terms of the subcontract.

5. Schaefer was required to minimize his damages

and cannot recover in excess of the unavoidable consequences of Macris' alleged breaches.

6. Schaefer's failure to comply with *Rem. Rev. Stat.*, Sec. 9980, prohibits entry of judgment in his favor.

7. There is no substantial evidence to support the decision of the district court that Macris breached the subcontract.

Appellee in his complaint sought to recover upon an alleged oral agreement with Macris superseding the written subcontract with respect to the fixed fee basis for payment and substituting instead the alleged oral agreement to pay for his performance of 1062 on a cost plus profits and overhead basis. In line with this theory Schaefer presented evidence of what his costs were, including an arbitrary percentage thereof for profit and overhead. But, though it appeared records were kept (Tr. 599, 561), no proof was offered as to the increased cost of Schaefer's performance resulting from the alleged failures on the part of the Macris (Tr. 1298-9). The district court found from the evidence that no such oral agreement had been entered into by Schaefer and Macris (Tr. 2214). The court then concluded that Schaefer was entitled to recover on implied contract or on *quasi* contract the reasonable value of his services in the performance of the

entire subcontract as measured by his total cost of performance and including an estimated overhead and estimated profit allowance, without regard to the price fixed by the subcontract for such performance (Tr. 2215).

It is respectfully submitted that a critical application of the fundamental principles of the law of contracts relating to breaches, remedies, and damages will reveal that, in so doing, the district court erred.

# 1. ONLY THE REMEDIES FOR PARTIAL BREACH OF CONTRACT ARE AVAILABLE TO SCHAEFER.

No doubt much of the confusion which exists with respect to remedies available to a party who has suffered from the breach of a contract is due to recurrent failure on the part of authors of judicial opinions to distinguish carefully in each instance between a total breach of contract, a partial breach of contract, and a breach which, though otherwise constituting a total breach of contract, is so treated by the other party that it acquires the effect of a partial breach only. However, as the authorities below disclose, this distinction is important from the standpoint of remedies available therefor.

*Restatement of the Law of Contracts*, Sec. 313, defines a total and a partial breach of contract as follows:



“(1) A *total breach* of contract is a breach where remedial rights provided by law are substituted for all the existing contractual rights, or can be so substituted by the injured party.

“(2) A *partial breach* of contract is a breach where remedial rights provided by law can be substituted by the injured party for only a part of the existing contractual rights.” (Italics ours.)

In Comment c to this section it is explained:

“c. Though a breach to any extent of a contractual duty of immediate performance gives rise to a right of action, a slight breach does not terminate the duty of the injured person or the right of the party committing the breach, unless non-performance of an express condition requires this result. In spite of a slight breach the promisor may perform the remainder of the contract and be subject merely to a remedial duty to give compensation in damages for the slight default.  
\* \* \*”

As to when a breach of contract is a total breach and when a partial breach, it is stated in Sec. 317, Subsection (1), *Restatement of the Law of Contracts*:

“(1) Except as stated in Sec. 316, any breach of contract is total if it consists of such non-performance of a promise or of such prevention or hindrance as is either material under the rules stated in Secs. 275, 276 or is accompanied or followed by one of the acts of repudiation enumerated in Sec. 318.”

Section 275 sets forth the circumstances influential in a determination of the materiality of a failure fully

to perform a promise, and Comment a thereof states:

“a. It is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem—when does a failure to perform a promise discharge the duty to perform the return promise for an agreed exchange. \* \* \*”

See also 12 *Am. Jur., Contracts*, Sec. 389.

In this case, however, there is no necessity for speculating as to whether or not under the circumstances the alleged failures on the part of Macris were material to the point of constituting a total breach of the subcontract. Assuming for argument, that such failures were material and that the cost of his performance was increased thereby, it still is not disputed that Schaefer continued to perform the subcontract and completed the performance of the subcontract. Where such is the case, the *Restatement of the Law of Contracts*, Sec. 317, Subsection (2), sets forth the rule:

“(2) Where there has been such a total breach of contract as is stated in Subsection (1), the injured party may by continuance or assenting to the continuance of performance, or by otherwise manifesting an intention so to do, treat the breach as partial, \* \* \*”

The following illustration is given for this subsection:

“7. A contracts to sell and deliver to B 100 tons of coal in each of six successive weeks, and B contracts to pay for them. A commits a breach, total because of its materiality. B nevertheless accepts a subsequent delivery. The breach can thereafter be treated only as partial.”

Thus, whether Macris' imputed failures were by nature total or partial breaches of the subcontract, they were treated as partial by Schaefer, who elected to continue with the performance of the subcontract. Nor is it necessary to dispute, although we do, the label of "continuing breach" attached by the court to Macris' performance of 1062 items related to the subcontract (Tr. 2213). Schaefer just as truly continued to treat such breach as partial by continuing his performance thereafter and accepting further and final performance by Macris, that is, final payment of the subcontract price (less only the percentage retained by the government and subject to government levy).

There is no judicial departure from the rules set forth in the section of *Restatement of the Law of Contracts* discussed above. See *Williston on Contracts* (Rev. ed.), Vol. 5, Sec. 1290; *Fry v. Grangers' Warehouse Co.* (1924), 131 Wash. 497, 230 Pac. 423; *Bankers Trust Co. v. Am. Surety Co.*, 112 Wash. 172, 191 Pac. 845; *U. S. v. Zara* (CCA-2nd, 1944), 146 F. (2) 606; *Ken. Nat. Gas Co. v. Ind. Gas & C. Corp.* (CCA-7th, 1942), 129 F. (2) 17, 143 A. L. R. 484. Certiorari denied. 317 U. S. 678, 87 L. Ed. 544, 63 Sup. Ct. 161; and *Ann.* 143 A. L. R. at 489.

The important difference between the effect of a total breach of contract treated as such by the injured

party and a partial breach or a total breach treated as a partial breach is that in the former case the contract is terminated by the breach and is at an end, except for the purposes of a suit on the contract for damages, while in the latter case the contract is still in existence and determinative of the rights of the parties. So, in the instant case, Schaefer, though complaining and objecting, elected to treat any failures on the part of the Macris as partial breaches and not as total breaches of the subcontract. By virtue of his determination so to do, the contract remained in force and effect, and performance thereof was also completed on the part of Macris, the final act thereof being payment of the contract price to Schaefer for his performance (save only the retained percentage). Consequently, all that remains to Schaefer, if anything, is his right of action for the partial breach or breaches of the subcontract by Macris; and Macris have as great a right as Schaefer to hold firmly to the terms of the subcontract, including the subcontract price. 12 Am. Jur., Contracts, Sec. 390, (Appendix 1).

## 2. SCHAEFER IS NOT ENTITLED TO RECOVER ON EITHER IMPLIED CONTRACT OR QUASI CONTRACT.

“Contracts are express or implied. Implied contracts are implied in fact or in law. \* \* \* Contracts implied in fact are inferred from the facts and circumstances of the case, \* \* \* their agreement is arrived

at by a consideration of their acts and conduct, \* \* \*. An implied (in fact) contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such a contract.” (Ours) 12 *Am. Jur., Contracts*, Sec. 4, pp. 498-500. *Chandler v. Wash. Toll Bridge Authority*, 17 Wn. (2d) 591, 137 P. (2) 97; *Western Asphalt Co. v. Valle*, 25 Wn. (2d) 428, 171 P. (2) 159.

The district court held (Tr. 2214):

“However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It’s hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think his conduct isn’t consistent with a meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.”

The court then held, in the paragraph immediately following (Tr. 2215):

“\* \* \* In other words, it is the view of the court that there was an implied contract, or per-



haps it would be more accurate to say a quasi-contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach."

Manifestly, the district court is in error if in using the term implied contract in the preceding quotation the court had in mind "an implied in fact" contract. For the court had just held that the oral declarations, acts and conduct of Schaefer and Macri were inconsistent with the "implied or *quasi*" contract raised by the court that Schaefer was to be paid the reasonable value of his performance without regard to the subcontract price. There could be no such agreement implied in fact under the authorities above nor under the following: 2 *Fed. Law of Contracts*, Sec. 527; *Hubbard v. New York, etc. Inv. Co.* (1886), 119 U. S. 696, 30 L. Ed. 538, 7 Sup. Ct. 353; *Stewart v. Fulton* (CCA 5th, 1911), 184 Fed. 719; *Sells v. City of Chicago* (CCA 7th, 1912), 120 CCA 212, 201 Fed. 874; *Barnett v. Beggs* (CCA 8th, 1928), 26 F. (2) 442; *Cope v. Beaumont* (CCA 3rd, 1910), 181 Fed. 756.

Recovery by Schaefer for the reasonable value of his entire performance without regard to the subcontract price cannot be supported on the basis of an implied in law or *quasi* contract either. It has been seen under the authorities heretofore discussed that

there was at all times in existence between the parties a valid subcontract. It is fundamental that there can be no recovery in *quasi contract* where there is a valid contract between the parties. 2 *Fed. Law of Contracts*, Sec. 493; *Cleve v. U. S.*, 263 U. S. 188, 68 L. Ed. 244, 44 Sup. Ct. 58; *Nelson v. Seattle*, 180 Wash. 1, 9, 38 P. (2) 1034; *McBride v. Callahan*, 173 Wash. 609, 24 P. (2) 105; *Frazier-Davis Const. Co. v. U. S.*, 100 Ct. Cl. 120; 12 *Am. Jur.*, *Contracts*, Sec. 7, p. 505, and authorities cited; *Kennedy v. B. A. Gardetto, Inc.*, 306 Mass. 212, 27 N. E. (2) 957, 129 A. L. R. 453; *Champion v. Hammer*, Ore. , 169 P. (2) 119; *Rose Funeral Home v. Julian*, 176 Tenn. 534, 144 S. W. (2) 755, 131 A. L. R. 858.

Where the parties have entered into a valid contract, recovery in *quasi contract* as for *quantum meruit* is limited to a situation in which there has been a total breach of the contract and an election on the part of the non-breaching party to rescind and sue in *quasi contract* or *quantum meruit*. *Restatement of Contracts*, Sec. 347.

It is stated in *Hawkins v. U. S.* (1887), 96 U. S. 689, 24 L. Ed. 607, at 610:

“Hence the rule is, that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written

agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*."

The above statement is quoted in *2 Fed. Law of Contracts*, Sec. 496, page 315. See also cases therein cited.

*2 Fed. Law on Contracts*, Sec. 487:

"It is a familiar principle of law, that, where circumstances occur which authorize a party to rescind a contract, he must elect whether he will rescind or whether he will pursue his remedies under the contract; he cannot do both; and a party may by continuing to treat the contract as in force waive a prior cause for rescission. Thus the right of a party, who contracted to dress stone to be delivered to him by the other party, to rescind because of a delay in the delivery of the stone is waived where he received and dressed a large part of the stone after shipments to him had been resumed."

The quotation above referred to the case of *Graham v. U. S.* (CCA 4th, 1911), 188 Fed. 651, 110 CCA 465. See also *2 Fed. Law on Contracts*, Sec. 492. It is for this reason that the case of *U. S. v. Zara Cont. Co.*, 146 F. (2) 606, is not in point, for that case in so far as recovery in *quantum meruit* is concerned involved a total breach of the contract, and the court held that the plaintiff's claim for extra compensation in addition to the contract was precluded if he had been forced to rely upon the contract (at pp. 609-610).

It is submitted that the district court in following

the case of *McDonald v. Supple*, 96 Ore. 486, 190 Pac. 315, committed error. The *McDonald* case is based upon the theory of abandonment of the contract by mutual acquiescence. See *Feldschau v. Clatsop Co.*, 117 Ore. 482, 244 Pac. 528. This is also the basis of the decision in the case of *Hayden v. City of Astoria*, 74 Ore. 525, 145 Pac. 1072, which is cited and relied upon in the *McDonald* case. In the later opinion in the same case, 164 Pac. 729, at 732-3, the court applies the correct rule of recovery, that is, contract price plus the cost of the additional burdens of performance. The same is true of the case of *Salt Lake City v. Smith*, 104 Fed. 457, 43 CCA 637, and the case of *Ingle v. Jones*, 2 Wall. (69 U. S.) 1, 17 L. Ed. 762 (Appendix 2), both of which are cited in the *McDonald* case.

The cases in which recovery is allowed for the reasonable value of part performance rendered and followed by a total breach of contract should also be carefully distinguished. In these cases recovery is limited to the contract price. *Great Lakes Const. Co. v. Republican Creosoting Co.* (CCA 8th), 139 F. (2) 456.

Rescission and recovery in quasi contract is not allowed where full performance or substantial performance has been rendered. *Restatement of Contracts*, Sec. 350; *Wray v. Young*, 122 Wash. 330, 210 Pac. 794; *Rozzano v. Moore*, 175 Wash. 566, 27 P. (2d) 1096;

*Marrazzo v. Orino*, 194 Wash. 364, 78 P. (2d) 181; *Nelson v. Seattle*, 180 Wash. 1, 38 P. (2d) 1034; *U. S. v. Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263, 46 Sup. Ct. 503, 504, 70 L. Ed. 938. The *Wyckoff* case, last cited, is controlling of the principles herein discussed. (Appendix 3.)

Recovery cannot be supported on a *quasi* contract theory with respect to the alleged extra burdens of Schaefer's performance because there has been no segregation of the cost or value of the performance of such burdens from the work done under the subcontract (Tr. 2154-5). *Nelson v. Seattle*, 180 Wash. 1, 38 P. (2d) 1034; *U. S. v. Wyckoff Pipe & C. Co.*, 271 U. S. 263, 46 Sup. Ct. 503, 70 L. Ed. 938. Nor did Schaefer qualify for such extra compensation under the terms of the subcontract (Ex. 5, Art. 3, Sec. 3). Schaefer's work beyond dispute, was performed under and for the purpose of accomplishing the work called for by the subcontract.

Under the authorities above and others too numerous to cite, he cannot recover in excess of the contract price in either implied in fact contract or *quasi* contract. The proper legal effect assignable to the finding of the court (Tr. 2215) that Macri made representations to Schaefer during the performance of the job that the bad conditions would be remedied is that such representations would prevent Schaefer's continued



performance of the subcontract from constituting in itself a waiver of his right of action on the contract for damages occasioned by Macris' alleged failures.

Therefore, it is submitted, that the district court erred in entering judgment in favor of Schaefer upon the basis of implied or *quasi* contract. It only remains to be determined whether or not under the evidence present there is any alternative ground upon which the district court's judgment can be sustained.

### 3. SCHAEFER'S ONLY RIGHT OF ACTION AGAINST MACRIS IS ON THE SUBCONTRACT FOR DAMAGES OCCASIONED BY MACRIS' PARTIAL BREACH.

The remedies available for breach of contract are: (1) An action on the contract for damages; (2) rescission, and restitution or recovery in *quantum meruit*; and (3) specific performance. *Restatement of Contracts*, Sec. 326. Rescission and recovery in *quantum meruit* are not available because Macris' breach was treated as partial and the right to rescind was waived by continued and complete performance of the contract. Performance of the subcontract having been completed, the remedy of specific performance is not available. There is left to Schaefer only an action on the contract for damages.

The normal rule of damages in an action for breach of contract is that the plaintiff may recover for those

damages which naturally and necessarily result from the injury complained of and which were within the contemplation of the parties at the time the contract was entered into. *Carroll v. Caine*, 27 Wash. 402, at 406, 67 Pac. 993; *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 188 Pac. 792; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 154 Pac. 123; *Guerini Stone Co. v. P. J. Carlin Const. Co.*, 248 U. S. 334, 39 Sup. Ct. 102, 63 L. Ed. 275; *Restatement of Contracts*, Sec. 346.

It is elementary that the burden is upon the plaintiff to prove his damages and that the same may not be recovered unless proved with reasonable certainty, speculative damages not being recoverable. It is also fundamental that in an action for breach of contract the breaching party is not required to pay for the plaintiff's poor bargain, that is, losing contract, as an element of the plaintiff's damages.

In the instant case, the only proper recovery by Schaefer would be for the increased cost of his performance, if any, occasioned by the delay resulting from the alleged failures of the Macris, and such increased costs must be proven. Such is the holding of the case of *U. S. v. Wyckoff Pipe & C. Co.*, 271 U. S. 263, 46 Sup. Ct. 503, 504, 70 L. Ed. 938, which is controlling of the decision here. In that case the Wyckoff

Pipe & C. Co. brought an action to recover damages against the government for breaching a construction contract and thereby delaying performance. The Wyckoff Co. was without fault and the government's delays confessedly caused the contractor some loss. The government paid the fixed contract price, plus an additional amount equal to 50% of the increase in labor cost as provided in the contract. Nothing else was paid on account of the damages caused by its delay. Suit was brought in the Court of Claims to recover compensation for the loss suffered and judgment was entered in the amount of \$10,122.99. Findings in the case recited that the record did not disclose by items the extra expense incurred by the contractor by reason of the delay in the performance of the work. The court made no finding or estimate of the loss so incurred but merely entered judgment based upon the amount which the reasonable value of the whole work was in excess of the amount which the contractor had received, to wit, the contract price. The U. S. Supreme Court held that the court of claims was in error and reversed the judgment. The opinion states the law, very pertinent to the present case, at 271 U. S. p. 266 (Appendix 3). See also *H. E. Crook Co. v. U. S.*, 270 U. S. 4, 70 L. Ed. 438, 46 Sup. Ct. 183; Ann. 70 L. Ed. 383; Ann. 115 A. L. R. 65.

Counsel for Schaefer flatly took the position that no

evidence of increased costs of performance due to Macris' failures, that is, segregation of costs of performance under the subcontract and the costs occasioned by Macris' failures, would be offered (Tr. 396, 2155-6), and no such proof was in fact made. It should be noted that Schaefer purchased no extra materials for the performance of the subcontract, whether required to be supplied by him or by the Macris (Tr. 394). No extra charge was made for Schaefer's heavy overrun of 14.5% (Ex. 17a; Tr. 1537, 1512). Although all of his complaint with respect to Macris' performance consisted of matters the direct or indirect effect of which would be to cause delay and slow down performance of the subcontract, there was no proof whatsoever as to how many days or hours were added to the performance because of such alleged breaches.

In the case of *Brand Inv. Co. v. U. S.*, 58 Fed. Supp. 749, at 758, the court states:

“\* \* \* However, when there is delay which constitutes a breach of contract in connection with the performance of which the property or equipment is used, there is an implication of an agreement to pay *only damages actually sustained* and an actual loss must be proved;—compensation is the fundamental principle, but actual loss is the measure of this compensation.”

See also *Great Lakes Const. Co. v. U. S.*, 96 Ct. Cl. 378; *C. J. Maney Co. v. U. S.* (1945), 104 Ct. Cl. 594, 62 Fed Supp. 953. Of the many cases considering a

contractor's or subcontractor's right to recover for increased costs resulting from delayed performance, the evidence in the *C. J. Maney Co.* case can well be contrasted with the evidence offered in the instant case to illustrate there was no proof present here as to the damage, if any, sustained by Schaefer as the result of the alleged breaches by Macris.

A distinction should be recognized between this case and cases in which, following a total breach, suit is brought on the contract for damages. Recovery is allowed for the cost of part performance, *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, where the nature of the work unperformed will not permit proof of the cost of completion and application of normal rule of damages in such suits. See *Patterson, Builders Meas. of Recovery for Breach of Contract*, 31 Columbia Law Review 1286. In any event, however, recovery for the cost of part performance is limited to the amount of the contract price. *Restatement of Contracts*, Sec. 333.

The court in the instant case is allowing recovery by Schaefer for overhead based upon 20% of the cost of the job, adopted entirely the wrong method of computing or estimating such an item. Such estimates in themselves have been severely criticised. *E. W. Patterson, Builders Meas. of Recovery for Breach of Con-*



*tract*, 31 *Columbia Law Review* 1286, at 1294. The proper method of ascertaining an overhead item to be allocated properly to a given job is by a consideration of the relation between the particular contract and the total amount of all current contracts under performance by the plaintiff. Schaefer, in this instance, the testimony disclosed (Tr. 372), had over 200 jobs under construction to which no consideration whatsoever was given in fixing the proper amount of the overhead of his company attributable to job 1062. *H. P. Foley Co. v. U. S.*, 63 Fed. Supp. 208, at 216; *Sachs v. U. S.*, 63 Fed. Supp. 59, at 71, 104 Ct. Cl. 372; *Brand Inv. Co. v. U. S.*, 58 Fed. Supp. 749.

Moreover, an allowance for any overhead whatsoever was improper in the instant case because the only portion for which recovery could be allowed was that extra overhead cost occasioned by the alleged failures on the part of Macris, causing an increase in the cost of performance. Of this portion of the overhead there was no proof whatsoever, nor even any estimate (Tr. 2214). Similarly, no allowance was proper as an estimated profit item. Schaefer had already been paid the subcontract price and his profit, if any, was included in that. The proper measure of damages to be applied is the increased cost to Schaefer occasioned by the alleged failures on the part of Macris. This is recognized by Schaefer in his complaint in paragraph 2

of the alternative second cause of action. Because of his failure to prove his increased cost of performance, the action should be dismissed, or nominal damages only should be awarded.

4. SCHAEFER IS NOT ENTITLED TO RECOVER IN EXCESS OF THE SUBCONTRACT PRICE BECAUSE OF HIS FAILURE TO COMPLY WITH THE CONTRACT PROVISIONS WITH RESPECT TO EXTRA COMPENSATION FOR DELAYED PERFORMANCE.

It is well settled that parties to a contract may stipulate and agree with respect to compensation for alterations and extras in the performance of a construction contract. Ann. 60 A. L. R. 649. Under government construction contracts which by their terms anticipate delay in the performance of the contract due to various causes, the government, and by analogy the principal contractor, does not obligate itself or himself to pay damages to a contractor or subcontractor solely because of delay in making work available for performance. *U. S. v. Howard P. Foley Co.*, 329 U. S. 64, 91 L. Ed. 44, 67 Sup. Ct. 154; *H. E. Crook Co. v. U. S.*, 270 U. S. 4, 70 L. Ed. 438, 46 Sup. Ct. 183; *U. S. v. Rice*, 317 U. S. 61, 87 L. Ed. 53, 63 Sup. Ct. 120.

The provisions of the subcontract requiring notice and statements with respect to extra compensation have been hereinbefore quoted. It is further submitted that Schaefer has not been damaged by reason of breaches, if any, on the part of the Macris

causing delay in performance of the contract and increased costs resulting therefrom because he has failed to comply with the terms of the subcontract, which is binding upon and determinative of the rights of the parties. The case of *Erickson v. Edmonds School Dist.*, 13 Wn. (2) 398, 125 P. (2) 275, so holds in a very analogous case. In the case of *Goss v. Northern Pac. Hosp. Ass'n*, 50 Wash. 236, 96 Pac. 1078, a like result was reached on the basis of a provision very similar to Art. III, Sec. 5 of Schaefer-Macris' subcontract. Compare *Byrne v. Bellingham Cons. School Dist.*, 7 Wn. (2) 20, 108 P. (2) 791. The reason for this rule is well stated in the case of *U. S. v. Blair*, 321 U. S. 730, 88 L. Ed. 1039, 63 Sup. Ct. 820, at 88 L. Ed. pp. 1043-4 (Appendix 4).

##### 5. SCHAEFER IS NOT ENTITLED TO RECOVER BECAUSE OF FAILURE TO MINIMIZE HIS DAMAGES.

As indicated above, the recovery allowed Schaefer is sustainable only on the basis that the same constitutes the increase in his cost of performance of the subcontract resulting from Macris' failures. It has been noted herein that the performance by Schaefer of all the bid items of job 1062 related to his subcontract would have cost him less than 1/7th of the amount of his recovery. By such an expenditure, for which he would have been compensated, he could have completely escaped damage. On the basis of his own

cost estimate (Tr. 2122), he could have done all excavations by hand and still saved \$25,000 in his cost of performance. The court found that following complaints by Schaefer, the performance of such items was tendered to him and refused. It is submitted that Schaefer is not entitled to recover because of his failure to mitigate his damages. *Arkley Lumber Co. v. Vincent*, 121 Wash. 512, 209 Pac. 690; *Peninsular Sav. & Loan Ass'n, v. Breier Co.*, 137 Wash. 641, 243 Pac. 830; *Poston v. Western Dairy Products Co.*, 179 Wash. 73, 36 P. (2d) 65; *Hoff v. Lester*, 25 Wn. (2d) 86, 168 P. (2d) 409. Only such damages normally and naturally flowing from breach of a contract as cannot be avoided by reasonable effort are recoverable. *Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273, 197 Pac. 39 (See Appendix 5). Schaefer's wilful withdrawal of his crew from the job site for a period of 71 days manifestly increased any damages he may have sustained. *Williston on Contracts* (Rev. Ed.), Sec. 1353; *Restatement of Contracts*, Sec. 336; *Wilker v. Hoppock*, 6 Wall. 94, at 99, 18 L. Ed. 752; *George A. Fuller Co. v. U. S.* (1946), 105 Ct. Cl. 248, 63 Fed. Supp. 765.

It is interesting to note with respect to the *George A. Fuller Co.* case, last above cited, that where there was a positive delay by the government for a period of three full months, the nature of which entirely pre-

vented the plaintiff from proceeding with the performance of the contract, plaintiff's recovery for delay was limited to \$62,000 (only slightly higher than the recovery allowed here by the district court) on a \$7,794,000.91 job. The total job price here involved was \$139,371.42 and the recovery by Schaefer, sustainable only as his increased cost of performance, constitutes practically 50% of that total job price, of which his subcontract price was less than 1/4th.

#### 6. SCHAEFER NOT ENTITLED TO RECOVER BECAUSE OF FAILURE TO FILE CERTIFICATE OF TRADE NAME.

It is submitted that under Rem. Rev. Stat., Sec. 9980, reading as follows:

“No person or persons carrying on, conducting or transacting business as aforesaid, or having an interest therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in section 9976, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit.”

The district court erred in entering any judgment on behalf of the use plaintiff, Schaefer, no such certificate as required having been filed prior to trial—or even prior to the closing of Schaefer's case in chief. *McGillivray v. Columbia Salmon Co.*, 104 Wash. 623, 177 Pac. 660; *Sussman v. Mentzer*, 193 Wash. 517, 76 P. (2) 595.



7. THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION OF THE DISTRICT COURT THAT MACRIS BREACHED THE SUBCONTRACT.

It is axiomatic, considering the sweeping deference accorded district courts' findings in a law action by the provisions of USCA Title 28, Sec. 879, Rev. Stat. 1011, that those courts' findings must be supported by substantial evidence.

The following *uncontroverted* and substantial evidence cannot validly be negatived in the present action by any provision of the district court's findings, conclusions or judgment:

(1) The principal contract, numbered 12r-14825 (Ex. 1, with Ex. 3), was completely performed, paid for any accepted (Ex. 61, final estimate). The court so found (Tr. 104; ff. 17).

(2) Specification 1062-1 lists Macris' 28 unit bid items, for each of which a unit price is provided in the schedule (Ex. 3, pp. 3-5). The Schaefer subcontract was for performance of only items 12 and 13—two of such 28 items (Ex. 5, with Ex. 3, p. 4, Items 12 and 13). The only items correlated to such subcontract Items 12 and 13 are Items 7, 8, 9, 10 and 15 (Ex. 3, pp. 3-4).

(3) Complete performance of the principal contract, acceptance and payment thereof would include complete performance of the 28 items bid by Macris.

with the 2 items therefrom subcontracted by Schaefer and with all correlated items as part thereof.

That was the entire value which went into such public work job 1062-1 (Ex. 61, Ex. 14, progress and final estimates). That is conclusively true against Macris, as principal contractors, and through them against Schaefer, as their subcontractor. That is true also regardless of whether or not bids by Macris on the 28 items or by Schaefer for the 2 subcontracted items therefrom were providently or improvidently made.

No more than the quantities represented by such 28 items as finally estimated and as paid at the contract unit prices therefor, respectively (Ex. 61, final estimate), went into such public work job 1062-1.

*In connection therewith it is here submitted that, unless there was "labor or material in the prosecution of the work provided in such contract" (as dictated by the very wording of USCA Title 40, Sec. 270b) and unless there was a "balance thereof unpaid" (id.), that is, unpaid as provided for by the terms of both the fully performed principal contract and the subcontract, there is no jurisdiction for this action having been brought in the district trial court under the Miller Act, USCA Title 40, Secs. 270a, 270b.*

The district court in its decision (Tr. 2214-5) definitely stated there was not "any meeting of the

minds" between Macri and Schaefer to substitute for the written subcontract (Ex. 5).

The principal contract, the specifications and the subcontract, therefore, remained as the only contractual documents throughout the entire performance and through completion, acceptance and payment for entire performance of the whole of public works job 1062-1 by the terms thereof.

That being true, there cannot legally be any disavowal of the terms of either the principal contract or the subcontract by either Macris or Schaefer.

The legal finality of the agreements themselves, as against controversy between the parties pertaining to compliance with contract terms, is well stated in *Mallory v. Olympia*, 83 Wash. 499, 145 Pac. 627, at page 503:

"The words 'the plaintiff wilfully abandoned his work under said contract and wholly failed to complete said contract in accordance with the plans and specifications and to the satisfaction of the city engineer,' considered in the light of the pleadings, make it plain that the issue before the court was whether or not the contract had been completed according to the plan. The contractor said it had. The engineer said it had not. We have no right to say, nor had the court in the former case, under the pleadings, the right to say, that there was a wilful abandonment. There was a dispute as to whether the work had been completed, and nothing more. \* \* \*"

Similarly, because of the existing contract documents and of the full performance of the work thereunder duly accepted, neither Macris as against the government nor Schaefer as against Macris could have validly asserted any claims for extras contrary to the terms of such contract documents.

Macris could not legally have claimed against the government for any extras under the principal contract except in the manner provided thereby and unless such extras were ordered by the government to be performed by Macris (Ex. 3, p. 10, par. 10). Similarly, Schaefer could not have claimed against Macris for any extras under the subcontract, except in the manner provided thereby and unless such extras were ordered by Macris to be performed by Schaefer (Ex. 5, p. 4, Art. 3, sec. 3).

No such order for any extras given by Macris, if it could be construed that at either of the meetings between Schaefer and Macri on April 29 or June 15, 1944, Macri did give any order (which is denied), was complied with by Schaefer (Tr. 2214-5). Schaefer did not furnish any statement for any claimed extras, regardless of whether or not they were ordered by Macris (Tr. 341, 1452, 1471, 2155).

We respectfully urge that there is a lack of substantial evidence to support the district court's judgment amount in the following particulars: (a) excava-

tions for structures; (b) "fine grading"; (c) lumber; (d) unskilled subcontract operations; and (e) reasonableness of amount.

(a) Excavations for structures. The district court found that Macris' excavations for structures were "made approximately one foot out from the base of the concrete structures and with practically vertical banks" (Tr. 100-1); that is, "with only the slope that would naturally result from the excavation by Macri's hoe-type shovel" (Tr. 2210).

The trial court erroneously concluded that the government pay quantity prisms for earth excavation for structures "are very persuasive as to what would be reasonable" clearance to place forms (Tr. 2209). Such specification provisions (Ex. 3, p. 22, par. 47) read as follows:

"The items of the schedules for excavation for structures include all required excavation for the structures between vertical planes at the upstream and downstream ends of the concrete structures or combinations of adjoining concrete structures: Provided, \* \* \* (covering bridges, turnouts, etc.) \* \* \*, provided further, \* \* \* (covering excavations preceding excavations of lateral or diversion channel prisms) \* \* \*. Except for the limitations described above, excavation for structures will, in general, be measured for payment to lateral dimensions one foot outside of the foundations of the structure and to slopes of 1 to 1 for common excavation and  $\frac{1}{4}$  to 1 for rock excavation: \* \* \*"



The same type of structure and the same type of excavation for it are required for rock excavation as for earth excavation. The error, therefore, of deciding that a bank slope of 1 to 1 is the reasonable requirement for Macris' excavation is apparent.

By way of illustration, we respectfully refer the court to the tabulation of structure headwalls, types and percentages in our foregoing statement of job facts. There is shown thereby 74% or 262 structures with a headwall of less than  $4\frac{1}{2}'$  and with not over  $3\frac{1}{2}'$  below ground surface. The government pay quantity prism for excavation for structures would be for a rock cut 1' out at the base, plus  $\frac{1}{4}'$  per foot of cut depth or  $\frac{1}{4}$  of 42" or 13", to make a total of 2' 1" or 25" clearance at the top of the rock cut, and would dictate for an earth cut one foot out at the base plus  $1 \times 3\frac{1}{2}'$  cut depth or  $4\frac{1}{2}'$  clearance at the top of the earth cut. Taking next a case of a structure with an extreme depth (that shown by the model, Ex. 25, which was "one of the deepest structures"—Tr. 1810) and calling the depth below ground 6' (Tr. 2036), the distance out at the top of the bank on a  $\frac{1}{4}$  to 1 slope would be 1' out at the base plus  $\frac{1}{4}$  of 6' depth, or  $2\frac{1}{2}'$ , to equal a total of  $3\frac{1}{2}'$  out at the top. While if the court's idea of reasonableness were applied it would be 1' out at the base plus  $1 \times 6'$  depth, or 7' out at the ground surface—a distance so far away from the form

as to be impracticable to get within working distance for placing the concrete in the forms. *Yet the same clearance is needed between the formwall and bank wall, whether the cut be rock or common excavation.*

The practical space between the formwall and the excavation wall is only that required to unfasten the form holders. Anderson, a man with years of experience on the Roza Project, explains the whole practicality of operating and required clearance at Tr. 1788-9. The reading thereof is respectfully commended to this court. Similarly, we respectfully call the court's attention to the testimony of Macris' first superintendent, Staples, that the hoe operation would cut "one width of the bucket" or 26" outside the stakes as set for excavation of a structure (Tr. 1732, 1753), and his further testimony that except on the first lateral none of the structures had vertical walls (Tr. 1754). Supporting Staples, Macris' superintendent Ashley also stated that the stakes were off-set from the place originally staked 1' out so that while standing after the excavation they were at a considerable distance from where they had been originally set (Tr. 1876-7). The district court missed this significant fact in pointing to Ashley's explanation of staking for a structure (Tr. 2210).

Significantly, too, Schaefer admitted his forms were not made perfect "by a long shot" (Tr. 1363), and

Lyons, his foreman, stated they made the hole fit whatever form panels were sent to them on the job, didn't check same (Tr. 1089). Also, Schaefer's "expert witness" Bufton stated that "excavations should be one foot out at the base" (Tr. 1152) and the court found they were substantially that (Tr. 100-1). Bufton also minimized Schaefer's complaints about carpenters digging by his statement "I certainly would have a shovel on the job while setting forms" (Tr. 1218). This significant and substantial evidence was also passed by the district court.

(b) Fine grading. The district court found that Macris "failed to do the fine grading *in accordance with the layout plans and specifications.*" (Tr. 101; ff. 12). (Italics ours.) Substantial evidence is to the contrary.

The layout plans (Ex. 12) do not specify anything about "fine grading." The specifications at Ex. 3, p. 23, par. 47, refer only to "finished by hand." Where the concrete itself rests on the ground instead of against a form the provision reads, p. 23:

"\* \* \* The contractor shall prepare the foundations at structure sites in a manner suitable for forming foundations for the concrete structures. The bottom and side slopes of common excavation *upon or against which concrete is to be placed* shall be finished accurately by hand to the dimensions shown on the drawings or prescribed by the contracting officer, and the surfaces so prepared

shall be moistened with water and tamped with suitable tools for the purpose of thoroughly compacting them and forming firm foundations *upon which to place the concrete structures. \* \* \**" (Italics ours.)

While Macri did a great deal of bank dressing—in fact had a crew doing it—it was an operation “for which specific unit prices are not provided in the schedules.” It was a labor item which Schaefer insisted was necessary and on the necessity of which he largely rested his claimed damages for delays. It was done by Macris and to the full extent done by them was not charged to Schaefer.

Like the gratuitous furnishing to Schaefer by Macris of a job office, constructed panel forms and 8 or 10 kegs of nails, it too was furnished to cooperate in getting timely Schaefer subcontract performance. The voluntary furnishing thereof did not make it a Macri legal obligation.

(c) Lumber. The district court also found that Macris failed to furnish lumber “in sufficient quantity and not furnished in quality which was the minimum requirement for work of this kind” (Tr. 101-2; ff. 13). Substantial evidence is to the contrary.

There is not any bid item, or pay quantity, in the specifications (Ex. 3, pp. 3-5) for either “fine grading” or lumber. Also, the Schaefer subcontract (Ex. 5) does not *specify* either fine grading or lumber as a

Schaefer item or as a Macri item.

The subcontract does provide that Schaefer will “furnish all labor and necessary equipment to do all the concrete work, formwork, cut, bend and install all reinforcing steel, all such work as shown in the plans and as specified in Specifications 1062, Contract No. 12r-14825, Roza Division, Yakima Project, Washington” (Ex. 5, pp. 1-2).

Specifications 1062 (Ex. 3, p. 22, par. 46) provides, for the pertinent part here, under the heading of construction of structures as follows:

“\* \* \* All structures shall be built in a workmanlike manner and to the lines, grades, and dimensions shown on the drawings or prescribed by the contracting officer. The contractor shall place and attach to each structure all timber, metal, or other accessories necessary for its completion, as shown on the drawings or as directed by the contracting officer. The cost of such work, *for which specific unit prices are not provided in the schedules*, shall be included in the unit prices bid in the schedules for the work to which it is appurtenant. \* \* \*” (Italics ours.)

Lumber is part of the form work and is recognized by the government as “an expendable item” (Tr. 1532) of the concrete work.

It is true that Schaefer cut his bid from \$30.00 to \$26.00 per cubic yard for concrete placed, with Macris to furnish the lumber (Tr. 1441, 419), because Schaefer felt Macri was in a better position to get it. (Tr.



390). While, strictly speaking, under the contract terms lumber was not a Macris subcontract item within the legal definition of "materials," Macris did furnish approximately 120,000 board feet of lumber plus plywood (Tr. 1471). Anderson estimated the total lumber required for job 1062 was 70,000 board feet and he gave his reasons from experience (Tr. 1796). Hance, a former Bureau engineer, estimated required lumber at 60,000 board feet (Tr. 1892). No total quantity was given by any Schaefer witnesses. Schaefer himself admitted that the quantity might have exceeded 150,000 board feet (Tr. 418).

There was a known national lumber shortage when Schaefer and Macris signed the subcontract. It continued throughout the operations, requiring priorities to get any lumber. The government recognized it and relaxed its requirements (Tr. 1528-9). Schaefer and his witnesses acknowledged it (Tr. 389, 1124, 1179, 1210). Two experienced reclamation project operators confirmed it (Tr. 1778, 2052; Ashley also, Tr. 1853). *No witness denied national lumber shortage.* Therefore, Schaefer and Macris contracted with that shortage as a continuing factor, which the district court did not consider.

Schaefer himself testified that the type of lumber he had selected in the seven boards shown as Ex. 29 came

from not to exceed two loads (Tr. 337) and from a total of not to exceed 5,000 feet (Tr. 418). He gave Macris no notice about it (Tr. 341). Anderson, who was familiar with the lumber, testified that it was adequate form lumber (Tr. 1797). Klugg, who had been on the job from the start to the finish and had worked on other Roza projects, testified that "the job had lumber coming there right along" (Tr. 2053). Nelson confirmed this (Tr. 1541).

These factors of acuteness in lumber, coupled with Macri's detail of his arrangement of ordering and endeavoring to secure unlimited supplies of lumber (Tr. 1591, 1592, 1594, 1595, 1597, 1624), furnish the only substantial evidence pertaining to lumber supplies.

(d) Unskilled subcontract operations. Only one example thereof need be given here. That is substantial evidence of Schaefer's unskilful job performance, which the district court wholly disregarded. Ex. 17a, the concrete engineer's report, shows Schaefer overran the job in use of concrete by 14.5%. Nelson, the government engineer in charge, stated that Ex. 17a indicates a factual determination through his office (Tr. 1512). He further stated that the substantial portion of 14.5% overrun of concrete would be represented by the amount that the forms were in *excess of the de-*

*signed amount* or that the subgrade could have been below grade. He further stated, on cross-examination, that he doubted that the subgrade was below grade because inspectors required compaction back to grade (Tr. 1537-8). He declined to state that over-excavation had occurred (Tr. 1539).

Hance, who inspected forms in the field at time of trial, found concrete walls varying from  $4\frac{3}{4}$ " to  $5\frac{3}{8}$ " and found most of the inspected structures from  $\frac{1}{4}$ " narrow to  $\frac{3}{8}$ " wide (Tr. 1924). This shows unskilful setting of forms to account for the 14.5% of concrete overrun, and Schaefer's elaborate claims of insufficient excavations.

Schaefer's expert, Bufton, stated (Tr. 1205) that anything over 2% of overrun of concrete would be excessive. At Tr. 1207 he raised it to 5% and concurred that it would indicate unskilful operation.

(e) Unreasonableness of judgment amount. The judgment of \$56,764.97—not counting in addition the \$32,614.66 paid Schaefer—is over  $7\frac{1}{2}$  times the full pay items of \$7,694.13 by the government for the 4 items, Nos. 7, 8, 9 and 10, correlated to the Schaefer subcontracted items 12 and 13. That means that if Schaefer had done all the correlated work items—and in fact he did not do them—the court amount would dictate that he be paid not the total contract price of \$7,694.13, but  $7\frac{1}{2}$  times that amount. This is top heavy

and unreasonable.

Similarly, considering that all structure excavations could have been made entirely by hand and so dressed for \$1.50 per cubic yard (figuring  $1\frac{1}{2}$  hours to dig a cubic yard) x 7512.5 cubic yards of common excavation for structures in the final estimate (Ex. 61), or \$11,-268.75, plus 246.6 cubic yards of rock excavations for structures (Ex. 61) x \$3.00 per cubic yard, or \$739.20, to total \$12,007.95 (Tr. 1901-2), the court's figure of \$56,764.95 is still \$44,757.02 grossly unreasonable, *if Schaefer had done that work*, which he did not. Or, even indulging in Schaefer's own estimate that it would take a man  $3\frac{1}{2}$  hours and would cost \$3.50 to dig a cubic yard of earth (Tr. 2122-2154) to total \$21,178.15, the court's figure is still \$25,596.82 grossly unreasonable.

We respectfully submit that a total to Schaefer of \$89,379.63 (\$56,794.97 judgment amount plus \$32,-614.66 paid) from the total gross earnings of \$139,-371.42 (Ex. 61) for the whole of job 1062-1, leaving only \$49,991.79 for the construction of  $10\frac{1}{2}$  miles of laterals and sublaterals and all other improvements in the whole job area, is so far out of line that there cannot be and there is not any substantial evidence to support it. *George A. Fuller Co. v. U. S.* (1946), 104 Ct. Cl. 248, 63 Fed. Supp. 765.

Further, with respect to the amount allowed Schae-

fer, the only evidence offered to support such a figure is Ex. 63, which purports to be a compilation from Schaefer's original books of account. The books themselves when offered in evidence were excluded. This was error. 20 *Am. Jur., Evidence*, 1051. Nor was there any attempt to segregate the costs (Tr. 1298-9). The witness who prepared the compilation did not keep the books. Schaefer's bookkeeper did not testify (Tr. 1265). Continuing objections pointing out the deficiencies of Ex. 63, overruled by the court, are evidenced in the record (Tr. 1245, 1251, 1252, 1259, 1265, 1266, 1267, 1275).

THE APPELLANT CONTINENTAL CASUALTY  
COMPANY IS NOT ENTITLED TO AN  
AWARD OF ADDITIONAL ATTORNEYS'  
FEES BY THIS COURT.

The cases cited by appellant, Continental Casualty Company, in support of its contention that it is entitled to recover an additional sum for attorneys' fees for services on its appeal, are cases in which the court was construing a federal statute which extended the right to recover attorneys' fees. In the instant case, that appellant's claim for attorneys' fees is contractual. The law of the State of Washington is determinative. Under the cases of *Flint v. Bronson*, 197 Wash. 686, 86 P(2) 218, and *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117, additional fees on appeal



are not recoverable unless fixed by the trial court. This holding is in accord with the general rule that an appellate court will consider only such questions as are raised below. *Am. Jur., Appeal and Error*, sec. 281.

### CONCLUSION

In conclusion, it is respectfully submitted that the judgment of the district court in favor of the use plaintiff M. C. Schaefer is opposed to the law applicable to this case, and is not supported by any substantial evidence. The judgment should be reversed and the action dismissed.

Respectfully submitted,

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# I

## APPENDIX

1. 12 *Am. Jur., Contracts*, Sec. 390, states as follows:

“Waiver of Total Breach; Election to Continue Performance.—The right to refuse to perform further or to accept further performance and to maintain immediately an action for damages because of a material or total breach may be waived, and the injured party may accept or insist on performance after such breach of the contract. Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part. *And under ordinary circumstances, where there is an existing actual breach of contract, of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance.*” (Italicized portion added to section by pocket supplement.)

2. *Ingle v. Jones*, 2 Wall. (69 U. S.) 1, 17 L. Ed. 762, at 764:

“While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue on the contract, or *indebitatus assump-*

## II

*sit*, and rely upon the common counts. In either case the contract will determine the rights of the parties.

“When he has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*.

“He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff’s deviations from the contract, not induced by himself, both as to the manner and time of the performance.

“There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications. *Cutler v. Powell*, 2 Sm. L. Cas., 1.”

3. *United States v. Wyckoff Pipe & C. Co.*, 271 U. S. 263, 46 Sup. Ct. 503, 504, 70 L. Ed. 938, at 271 U. S. page 266:

“The government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay (*United States v. Smith*, 94 U. S. 214, 24 L. ed. 115; *United States v. Mueller*, 113 U. S. 153, 28 L. ed. 946, 5

### III

Sup. Ct. Rep. 380; Ripley v. United States, 223 U. S. 695, 56 L. ed. 614, 32 Sup. Ct. Rep. 352); that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon *quantum meruit*. The contention is, in our opinion, well founded.

“The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the government’s delay. After completing performance it brought this suit declaring on the original contract.

“The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the government job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor’s contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain



## IV

both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare *Erie County Natural Gas & Fuel Co. v. Carroll* (1911) A. C. 105—P. C. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job. "It is argued that the court of claims is under no obligation when assessing damages to specify the elements of the calculation by which it arrives at its results; that itemization is often impossible; and that, like a jury, the court may make an estimate and return such sum as the damages recoverable (compare *United States v. Smith*, 94 U. S. 214, 219, 24 L. ed. 115, 116), and that, accepting the rule that damages are to be limited to actual loss, the award of the lower court is to be regarded as an estimate of such loss. But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely the increase in value of the work at the time it was performed and the increase in value of the material during the period of the delay. Then it found and concluded, as a matter of law, that the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error."

4. *U. S. v. Blair*, 321 U. S. 730, 88 L. Ed. 1039, 63 Sup. Ct. 820, at 88 L. Ed. pp. 1043-4:

"Respondent has thus chosen not to follow 'the only avenue for relief,' *United States v. Callahan Walker Constr. Co.*, 317 U. S. 56, 61, 87 L. ed. 49,

53, 63 S. Ct. 113, available for the settlement of disputes concerning questions arising under this contract. In Article 15 the parties clearly set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactorily by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.”

5. *Cannon v. Oregon Moline Plow Co.*, 115 Wash. 273, 197 Pac. 39, at page 281:

“In this case the power necessary to plow appellant’s land for seeding the crop could not be limited to the tractor purchased by him from the plow company. He had refused to strain his credit by procuring the discount of the notes and paying the cash to the plow company as it desired, and the plow company thereupon, wrongfully it is true, cancelled the contract and retook the tractor; but there were other tractors in Spokane—a large and populous commercial and industrial center—and if it was necessary to have a tractor immediately, appellant does not deny that he could have, as he says, strained his credit and bought what he needed, but he did not feel inclined to do so.

“It will not do to adjudge that one can hold a particular person exclusively liable for all the re-

## VI

sults that may flow from a tort or breach of contract which were reasonably preventable; for, if such damages are allowed, which can be avoided or prevented, in whole or in part, by the exercise of ordinary diligence on the part of the injured party, the results to business will be disastrous. The enormous damages that might ensue from the breach of the smallest contract, or from the slightest tort, may be so augmented that no one would be safe in doing any kind of business. Upon this ground alone, in this particular case, without further considering any of the other important questions discussed by counsel, we are satisfied that appellant is not entitled to recover the damages claimed by him."

**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

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CONTINENTAL CASUALTY COMPANY, a  
corporation,

*Defendant and Appellant,*

vs.

THE UNITED STATES OF AMERICA, for  
the use of M. C. SCHAEFER, an individual  
doing business as CONCRETE CON-  
STRUCTION COMPANY,

*Plaintiff and Appellee,*

A. C. GOERIG and CLYDE PHILP, individu-  
als and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE  
MACRI, individuals and co-partners.

*Defendants and Cross Appellants.*

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**BRIEF OF APPELLEE SCHAEFER**

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Upon Appeals from the District Court of the United  
States for the Eastern District of Washington,  
Southern Division.

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**FILED**

**JUL 24 1948**

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**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

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CONTINENTAL CASUALTY COMPANY, a  
corporation,

*Defendant and Appellant,*

vs.

THE UNITED STATES OF AMERICA, for  
the use of M. C. SCHAEFER, an individual  
doing business as CONCRETE CON-  
STRUCTION COMPANY,

*Plaintiff and Appellee,*

A. C. GOERIG and CLYDE PHILP, individu-  
als and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE  
MACRI, individuals and co-partners.

*Defendants and Cross Appellants.*

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**BRIEF OF APPELLEE SCHAEFER**

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Upon Appeals from the District Court of the United  
States for the Eastern District of Washington,  
Southern Division.

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**JURISDICTION**

This action was brought in the Federal District Court

in the name of the United States of America for the use of M. C. Schaefer, an individual doing business as the Concrete Construction Company, as plaintiff, under and by virtue of the authority granted by Title 40, U.S.C.A., Sections 270 a and 270 b; 49 Stat. 793, 794, known as the Miller Act (Tr. 2, 10, 95, 104).

(All numerical references herein, unless otherwise indicated, are to the pages of the printed transcript of record on file herein. All italics are ours.)

This is an action by a subcontractor to recover the value of labor and materials furnished to the general contractor in the construction of a federal irrigation project, the defendants being the general contractors, their partners or joint adventurers, and their surety.

These appeals by appellant Continental Casualty Company and cross-appellants Macri, from the judgment entered against them (Tr. 112 to 115), are pursuant to Title 28, U.S.C.A., Section 225; 26 Stat. 828, as amended, and the question of the jurisdiction of this court is hereby raised with respect to the appeal of cross-appellants Macri, inasmuch as their notice of appeal was not filed within three months after the entry of judgment as prescribed by Title 28, U.S.C.A., Section 230; 26 Stat. 829, as amended. The Circuit Court of Appeals order entered herein on March 31, 1948, limits the Macri appeal to a review of the judgment pertaining to the one subcontract under specification No. 1062.



**STATEMENT OF CASE**

By the terms of the subcontract entered into between the defendants Macri, doing business as Macri Company, referred to hereinafter as Macri Company, and the use plaintiff, M. C. Schaefer, doing business as the Concrete Construction Company, hereinafter referred to as Schaefer, the latter agreed to furnish "all labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel," as shown in the plans and specifications No. 1062. It was agreed in the subcontract that all of the excavating and all of the materials necessary for the performance of the subcontract by Schaefer, were to be furnished by Macri Company, with the exception of form wire, nails and curing material. It was further agreed therein that the excavating was to be done, and the materials were to be supplied by Macri Company, in accordance with the plans and specifications and in proper time for performance of the subcontract by Schaefer (Tr. 99, 100).

About two months after this subcontract was executed, Macri Company and Schaefer entered into another subcontract requiring the same sort of work by the latter in another part of the Roza Project, covering specification No. 1068 (Tr. 105, 106). Schaefer did not commence to perform this subcontract for the reason that Macri Company failed to prepare the excavations (Tr. 107, 108). Schaefer has not attempted in this action to recover any sum whatever on account of Macri Company's breach of this subcontract as he did not furnish them any labor or materials in performance of

it. Macri Company filed a cross-complaint against Schaefer for breach of this subcontract, however, but it was dismissed by the trial court with prejudice (Tr. 111, 114), and Macri Company failed to perfect an appeal within the prescribed time. Consequently, specification No. 1068 is not involved on this appeal. Unless otherwise plainly stated, therefore, the entire discussion in this brief relates only to Schaefer's right to recover by reason of his performance with reference to specification No. 1062.

The court found that Schaefer entered into the diligent performance of the subcontract covering specification No. 1062 (Tr. 100). It is conceded by all of the parties in this case that so far as the furnishing of labor and materials is concerned, Schaefer did everything he was required to do by the subcontract. He finished all of the work specified therein and it was accepted by Macri Company and the government. It is not claimed by any one that any portion of Schaefer's work was done improperly, or that he was responsible for any delay in its completion.

On the other hand, Schaefer's claim against Macri Company, and the Continental Casualty Company as their surety, is based upon the continuing, willful failure of Macri Company to perform adequately and within a reasonable time the obligations imposed upon them by the subcontract. The claim of Schaefer with respect to the failures of Macri Company to perform their obligations will be briefly summarized.

The sides of the excavations were frequently out of line, which necessitated either further digging or cribbing and back-filling. The sides of practically all of the excavations were vertical or nearly so, and they were not excavated on a one to one slope, that is, on a forty-five degree angle, which necessitated extensive hand digging and caused Schaefer a great deal of trouble and expense. The fine grading designed to bring the bottoms of the excavations to correct levels, was occasionally too low and in nearly every other instance was too high, necessitating further hand digging which increased the work and expense to Schaefer. Other sorts of fine grading were likewise defective. Finally, the original excavating and the fine grading were so delayed as to constitute a hindrance and expense to Schaefer in that the employees of Schaefer had to do a considerable portion of the fine grading themselves in order to get the work done within any semblance of a reasonable time. With respect to lumber for forms, which Macri Company was obligated to furnish Schaefer, the quantity was insufficient, it was not furnished on time and was not of suitable quality.

The defects in the excavations as they were prepared by Macri Company will be first considered.

The sides of many excavations were out of line. Mr. Schaefer testified that when he met Sam Macri at the job site on April 29, 1944, they checked six or seven excavations and found none of them proper. He said that in some instances the excavations were not even large enough to hold the neat concrete, the concrete structure in finished form (Tr. 220). Mr. Darcy, Schae-

fer's superintendent after August 10, 1944, testified that quite a few of the excavations were off the lateral line and that the sides of some had to be cribbed and back-filled where Macri Company had over-excavated (Tr. 457).

The sides of the excavations in practically all instances were vertical, or nearly so. The specifications prepared by the Bureau of Reclamation provided that the government would pay the general contractor for the removal of common earth one foot out from the base of the concrete structure and on a slope of one to one where clearance was required in the excavations for the insertion of forms (Tr. 2208). The court declared in his opinion that the pay provisions of the specifications regarding clearance and slope were not absolute requirements, but that it was the obligation of Macri Company to do the excavating in such a way as to afford Schaefer a reasonable clearance and a reasonable opportunity to properly and efficiently carry out his part of the work. The court expressly stated in his findings of fact that where a form had to be placed between the concrete and the bank, a reasonable clearance required an excavation of one foot out from the base of the concrete structure to be built and a slope of one to one on the bank. The court said (Tr. 100, 101):

“ \* \* \* that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient



width in the excavation to enable the subcontractor to efficiently and properly construct his forms and he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of the work."

Mr. L. E. Bufton, an experienced engineer in concrete construction (Tr. 1135 to 1139), testified that in a proper excavation there would be a clearance of at least one foot on the outside of the finished concrete structure at the base, and a slope of one to one, to permit the insertion and removal of the forms (Tr. 1152). Mr. M. C. Schaefer, likewise, after qualifying as an expert in concrete construction (Tr. 1337 to 1340), testified that the lateral clearance reasonably required to permit the assembly of forms, was as stated by Mr. Bufton (Tr. 1340 to 1343).

In his oral opinion the court said: "The evidence is overwhelming that excavation was not made in that manner (Tr. 2210)," that is, one foot out at the base and on a slope of one to one. This statement by the court is so fully supported by the testimony that it will be unnecessary to do more than name some of the witnesses who so testified:

M. C. Schaefer, the use plaintiff (Tr. 205, 220, 231, 328)

Fred Waltie, Schaefer's first superintendent (Tr. 676, 700)

P. L. Darcy, Schaefer's superintendent after August, 1944 (Tr. 456, 457, 461)



- V. E. Ashley, Macri Company's first superintendent (Tr. 1875, 1876, 1877)
- J. A. Black, who has charge of Macri Company's fine grading crew (Tr. 852)
- M. E. Stickney, Macri Company's superintendent from August until December, 1944 (Tr. 590)
- C. E. Hewitt, an engineer employed by Schaefer (Tr. 827)

With respect to the testimony of V. E. Ashley, the court said (Tr. 2210):

"A significant piece of testimony, it seems to me here, is that of Mr. Ashley, who was Macri's superintendent for a period of time on this job. He testified, if my memory serves me right, that during his period as superintendent he staked out the excavations to be dug, and that his stakes were one foot out from the outer wall of the concrete at the surface of the ground; that he staked them out that way, and certainly the people who came after him would follow the superintendent's directions, and excavate them not more than one foot out, and that's not at the base, it was at the surface, \* \* \*."

The effect of these vertical banks upon Schaefer's performance of his obligations, was of tremendous importance for the reason that they probably constituted the greatest obstacle placed in the path of Schaefer by Macri Company.

In the first place, the walls of the excavations, being practically vertical, were too tight to receive the forms and it was therefore necessary for Schaefer's carpenters who were attempting to erect the forms in the excavations, to excavate further to make room for the forms (Tr. 206, 212, 222, 457, 700). In the second

place, Schaefer, in computing the amount of his bid to Macri Company, assumed that the walls of the excavations would be dug out one foot from the base of the finished concrete structure and on a one to one slope which would have permitted the panels making up the forms to be used repeatedly without trucking them back to the yard. Mr. Schaefer testified that his figure was based on taking panels to the job, building the forms in the excavations, pouring the concrete, then stripping the forms with but very little damage to them, and moving them on to structures ahead instead of hauling them all the way back to the yard (Tr. 225). He said that this could have been done if Macri Company has excavated the walls out one foot and on a one to one slope. He testified, however, that the excavations furnished were so tight that most of the panels could not be removed without being damaged. As a result, most of the panels could not be repaired on the site but had to be returned to the yard for repairs and sent back to the job, perhaps only a stone's throw from the excavation from which they had just been removed (Tr. 226, 343, 344, 345). Furthermore, the damaging of the wood panels shortened their useful life, thereby putting an additional strain upon the inadequate supply of lumber.

Another serious failure of performance on the part of Macri Company was their failure to fine grade the excavations to the proper level. With respect to this the court said (Tr. 101):

“That the defendants Macri and Company failed to do the fine grading in accordance with the lay-

out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work."

This finding is likewise supported by the overwhelming weight of the evidence and it will therefore be necessary simply to list the witnesses who so testified:

M. C. Schaefer (Tr. 212, 221, 233, 280)

Fred Waltie (Tr. 677, 687, 688, 691, 692)

P. L. Darcy (Tr. 456, 457, 459)

M. E. Stickney (Tr. 591, 654, 655)

Hawley Robbins, one of Schaefer's carpenters (Tr. 1031, 1036, 1037)

With respect to the delays on the part of Macri Company in completing the excavations, the court said (Tr. 101):

"That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work."

This finding is likewise fully supported by the testimony of the witnesses indicated, on the pages of the transcript just stated. In summarizing their testimony, it may be said that the failure of Macri Company to do the fine grading properly and promptly, imposed the following burdens on Schaefer: Searching for the

Macri Company superintendent or foreman to report that the excavations were not properly fine graded, waiting for the fine graders to return, and doing the fine grading knowing that they might not return within a reasonable time. The testimony indicates that in most instances the grades were too high which necessitated digging out more earth. The amount of earth thus required to be removed varied from one to four or five inches in depth. Several inches in elevation, coupled with dirt piled at the base of the walls, frequently meant that several cubic yards of dirt had to be removed. On one occasion Schaefer's carpenters were required to spend more than eight hours in fine grading one excavation before they could commence the construction of the forms. Fred Waltie testified that on an average about twice as much time as was necessary, was used to construct the forms (Tr. 686).

Concerning the contention of Schaefer that Macri Company failed to furnish an adequate supply of suitable lumber for the construction of the forms, the court made this finding (Tr. 101):

"That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality was not proper and suitable for the work intended; that much of the time there was missing some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind."



One of the principal complaints with respect to lumber was that on many occasions there was either no lumber at all or some essential type was missing. Mr. Schaefer testified that he visited the job on May 3, 1944, and found no excavations ready and no lumber (Tr. 233). He returned to the project on May 19th and again he found no work going on and no lumber (Tr. 280). P. L. Darcy, Schaefer's superintendent after August 10, 1944, testified that he visited the job on June 29th. He said there was no lumber there, and added (Tr. 461, 462):

"One thing that was wrong with the job was it wasn't moving when I went up there, because there was no lumber to finish setting or tying up forms, to put on strongbacks. \* \* \* Approximately the 8th or 9th of July we got a small load of lumber, about 1500 feet of ship-lap, and a few two by fours, and we did a little form setting with that. \* \* \* It was a fair grade. We repeated our request for lumber on an average of at least four times a week. Lumber was never there when we needed it and we would be promised at least twice a week for sometimes six or seven weeks that we would be having a load of lumber within a few days and it never came. \* \* \*

Q. Now, when you would request additional lumber, would it always be furnished promptly?

A. Never."

The lack of lumber forced additional work upon Schaefer in addition to the frequent delay. Panels which might have been used again without alteration, could not simply be set aside to wait for future use, but had to be rebuilt, because of the lack of lumber, to a different size. (Tr. 463).



Other witnesses confirmed the fact that the supply of lumber was inadequate:

Fred Waltie (Tr. 681)

W. E. Schaefer (Tr. 1081)

Hawley Robbins (Tr. 1040)

M. E. Stickney, Macri Company's superintendent from August until December, 1944, testified that it was his recollection that, "there usually was an order for lumber in the office all the time (Tr. 659, 660)." He said that when requests were received for additional lumber from Schaefer, he, Stickney, relayed them to Mr. Sam Macri and that Mr. Macri's reply was that it would be over within a day or two, or on Monday, but it came very seldom when he promised. Mr. Macri never refused to send the lumber, he said, but he usually made an excuse that he hadn't been able to send it (Tr. 595). Finally, Mr. Stickney testified that Mr. Sam Macri refused to permit him to buy lumber locally when there was none on the project. In fact, he testified that Mr. Macri refused him permission to buy lumber locally, even in an emergency (Tr. 640).

With respect to the quality of the lumber furnished to Schaefer for forms, Hawley Robbins, one of his carpenters from September until practically the end of the job, testified that it was "mighty poor lumber for that kind of work (Tr. 1030)." He said that much of it was wet and green and that it would dry and shrink considerably. He added that it was "awfully knotty,

poor stuff." Some of it was warped to a certain extent. Some of it was second hand and was checked and broken up quite a lot (Tr. 1030).

Exhibit 29 consists of seven pieces of lumber which were delivered to the yard in September, 1944, as part of a quantity of about five thousand feet. Mr. Schaefer testified that they were representative of that particular delivery (Tr. 334 to 341).

In summarizing his findings with respect to the failure of Macri Company to perform their obligations, the court stated that they breached their subcontract in the particulars herein set forth and that "said breach on the part of defendants Macri Company was wilful and negligent." For convenience the finding set forth in full (Tr. 102):

"That the defendants Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was wilful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff."

The court's conclusion that the failure of Macri Company to perform its obligations was willful and negligent, is fully supported by the testimony.

In the first place, M. E. Stickney, Macri Company's superintendent from August until December, 1944, gave

testimony which has a very important bearing upon this finding. He said that a few days before he went to work, Mr. Sam Macri told him that the excavations "were to be staked one foot outside of the concrete line all around, and dug vertical (Tr. 590)." He also testified that after he went to work he had a talk with Mr. Macri on the job about the fine grading. He said that Mr. Macri told him, "A few tenths of a foot, in elevation one way or the other didn't make any difference, that he was paying Mr. Schaefer extra for a little fine grading anyhow (Tr. 591)." Mr. Stickney stated that he checked certain excavations and found them wrong, and then suggested to Mr. Macri that they go back and fine grade again. He said that Mr. Macri's reply was, "No, that would cost too much money, \* \* \* and what little work there would be, he'd rather pay Mr. Schaefer than put a crew back and fine grade ourselves." Mr. Stickney then testified, "I did return and fine grade some but just the worst of them (Tr. 593)."

Mr. Stickney said that he quit his job following a conversation with Mr. Macri in which the latter said, "It looks like you're trying to work against me, instead of for me (Tr. 598)."

Mr. M. C. Schaefer testified that he had an appointment with Mr. Sam Macri on April 28, 1944, at the job site, but he failed to appear. He said he then told Mr. Staples, Macri Company's superintendent, that he wanted to talk to Mr. Macri before noon the next day, otherwise he would leave the job. Mr. Schaefer

added that Mr. Staples said in reply, "Don't do that, \* \* \* I believe he's going to quit interfering with my program, telling me to lay off men, that I've got too many men on the job (Tr. 212, 213, 215, 218)."

Mr. Schaefer covered in considerable detail two meetings with Mr. Sam Macri on the project, during which he, Mr. Schaefer, presented all of his complaints to Mr. Macri in person. Mr. Schaefer said that at the first meeting on April 29th, Mr. Macri agreed to have the necessary men and equipment on the job and agreed to "get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day," in order that Schaefer would never be "stymied like this again (Tr. 226)." Mr. Schaefer then testified, "His (Macri's) progress or his method of excavating was no different from that time on; there wasn't any improvement in his operation." He said that there was no one to one slope, the walls were vertical and there was no more clearance than before, and that the fine grading was in the same terrible condition (Tr. 231). Mr. Schaefer testified that at the second meeting on June 15th he told Mr. Macri, "If Staples had any cooperation from you he would have done a whole lot better because you've been telling him to lay off." He added, "I told him I didn't believe you've ever given him instructions to excavate according to specifications, otherwise he would be doing it." Macri's reply to this accusation was simply, "we're getting started (Tr. 286)."

Mr. Darcy, Schaefer's second superintendent, tes-



tified that he asked V. E. Ashley, Macri Company's superintendent from June until August, why he left the job, and Ashley replied that it was because he didn't get the machinery he needed when he asked for it, he couldn't get lumber when it was needed and asked for, and because he had negotiated with two different engineers to take over the grading on that work but when he had consulted with Mr. Macri the latter refused to pay the required wage scale and Mr. Ashley couldn't put them on as the men wouldn't work for any less, and finally because he didn't have equipment to handle fine grading crews, that is, to get them around on the job (Tr. 2172).

Mr. Waltie, Schaefer's first superintendent, also testified with respect to the meeting of June 15, 1944, between Mr. Schaefer and Mr. Macri. He said that in connection with the fine grading Mr. Macri said that two or three tenths of a foot in grade was nothing to be concerned about and that it wouldn't amount to anything. Mr. Waltie then testified that in most cases two or three tenths of a foot would actually be a couple of cubic yards of earth to be taken out of the excavation, when added to the earth at the base of the walls (Tr. 699).

Mr. W. E. Schaefer also testified that in a conversation with Mr. Staples, one of Macri Company's superintendents, the latter said to him, "I know your outfit is a good operator, and I hate to be holding you back like this, but I can't get any co-operation with



Macri." This conversation took place on May 19, 1944 (Tr. 1083).

Immediately after the commencement of work by Schafer, complaints were made by his men that Macri Company was not complying with the terms of the subcontract. In fact, the evidence indicates that such complaints were made repeatedly throughout the performance of the work by Schaefer. The failure on the part of Macri Company to perform his obligations led to two important meetings between Mr. Schaefer and Mr. Macri. The court's finding with respect to these complaints and meetings is as follows (Tr. 102):

"That immediately after the commencement of the work by the use plaintiff Concrete Construction Company the said use plaintiff and his representatives complained to the defendants Macri Company and to Mr. Sam Macri and to his agents on the job as to the failure of the defendants Macri Company to comply with the terms of its subcontract, and that said use plaintiff stated he would pull off the job if conditions were not improved and that the defendants Macri Company on several occasions promised that they would do better and that they would see that their work was done in accordance with the requirements of the subcontract and in a proper manner and advised the use plaintiff that if he would go on and complete the contract that the use plaintiff wouldn't lose anything on the contract and that the defendant's Macri Company would make it right and would pay the use plaintiff for what he might lose under the adverse conditions created by the defendants Macri and Company's failure to do their work properly; that by said promises the defendant Macri Company induced the use plaintiff to proceed with the work and the use plaintiff did proceed with the

work by reason of said representations, and that there was an implied agreement or a quasi-contract that the use plaintiff, M. C. Schaefer, was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon said use plaintiff by Macri Company's breach and failure to perform his part of the subcontract in the particulars herein set forth."

Because of the importance of the conversations at the meetings mentioned, they will be set forth in some detail.

On April 29, 1944, approximately six weeks after the subcontract was executed, the two men met at the job office. They drove out to the field and, in the company of W. E. Schaefer and George Staples, stopped at structure No. 18 where Fred Waltie, Schaefer's superintendent, and George Schuler, a form setter, were excavating. Mr. Schaefer told these men to stop their work, his reason being that the excavating was not a part of the subcontract (Tr. 219, 220). The group of men checked six or seven excavations and all were defective in the particulars heretofore mentioned (Tr. 220,221). Mr. Macri told Mr. Schaefer that the latter should take care of the two or three tenths of a foot of fine grading, but Mr. Schaefer responded by saying that he wouldn't have a thing to do with it. Mr. Macri then replied. "We'll get the excavating right from now on," and then told his superintendent, Staples, to get the men in and get "this little grading done." Mr. Macri asked Mr. Schaefer to do the excavating, saying that he would pay for it, but Mr. Schaefer refused to

undertake the work and asked Mr. Macri to have sufficient men there so he wouldn't be delayed, that the excavations be done according to specifications and that ample lumber be supplied in time so that Schaefer's men could pour not less than 20 yards of concrete per day. Mr. Schaefer reminded him of his promise to so perform his obligations that Schaefer would be off the job by September 15th, that is, off both jobs, 1062 and 1068, by that date. Mr. Macri replied, "You'll be out of here by September 15th, there isn't gonna be anybody lose any money on our job; we'll get this thing straightened out and get going. \*\*\* I'll pay you for the expense of excavating that you do here (Tr. 221 to 224)." Mr. Schaefer's reply to these words was, "Who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, \*\* instead of to specification, of stripping the forms out of these holes, doing the necessary excavating to get them out, wrecking them, having to haul them all back to the yard for repair, instead of to structures ahead?" The following conversation then took place. Mr. Macri said, "I'll pay you for all the extras, just get going." Mr. Schaefer replied, "You're going to pay for all the additional cost and expense." Mr. Macri then said, "I told you that before." Mr. Schaefer then added, \*\*\* You're going to have the necessary men and equipment in here, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day (Tr. 225 to 227)." Mr. Macri then

Mr. Schaefer returned to the project on May 19th and found no work going on and no lumber. The side walls still required additional digging to accomodate the forms and there were no excavations ready for forms. Mr. Schaefer then instructed his superintendent to take all of the men back to Portland with the exception of two (Tr. 279, 280, 282).

Mr. Schaefer met Mr. Macri again on June 15th, on the project. The others present at the meeting were Fred Waltie, Allyn Hunter and Mr. Cohen, a Macri Company engineer. All of these men testified except Mr. Cohen. There was still nothing being done. The shovel was broken down and was in the yard. Macri Company did not have a hand excavating crew on the job. In fact, there was no one on the job (Tr. 284, 285, 286). At that time enough forms had been prepared to permit the assembly of about 72 to 75 structures, the term used to designate the forms when ready to recieve concrete. There were no excavations ready for the placing of the structures, however, and, in fact, none was ready to receive forms until June 29th. On that day Mr. Macri demanded that Schaefer get back on the job, and the men returned from Portland to the project a few days later (Tr. 325, 326). At the meeting of June 15th another conversation was held between Mr. Macri and Mr. Schaefer which was substantially similar to that of April 29th. After discussing the general situation, Mr. Schaefer said to Mr. Macri, "We won't be through with this job by September 15th." Mr. Macri replied "Nobody's lost any money on my job.



We'll be out by September 15th. This little excavating, you go ahead and do it. We'll pay for it." Mr. Schaefer then said, "That isn't all you're going to pay for. You're going to pay all the costs, all the expenses, all the extras." Mr. Macri replied, "Well, I told you that before; quit arguing. \* \* \* You're not going to have to wait for anything any more. You just get back here and get going." Mr. Schaefer then said to him, "We'll want to have enough holes ahead for at least 80 structures of concrete, \* \* \* so we'll have at least four days of pour (Tr. 286, 287)."

W. E. Schaefer testified that on April 29th, his brother told Mr. Macri that he didn't want anything to do with the excavating, the fine grading, saying, "We've spent too much money on this now, trying to get started. If this keeps up, we'll tear these forms out, they'll have to go back to the shop and repair them, they'll wreck them when they take them out, where otherwise we could take these panels to another structure without hauling them to the yard and hauling them back." Mr. Macri then replied, "Don't worry about that. I'll pay all your costs and expenses on that; just let's get started and quit arguing about it (Tr. 1079)." With reference to the amount of money Schaefer would make on this job, Mr. Macri said, "Nobody ever lost any money on Macri's job, and we wasn't either; that we should make between \$11,000 and \$12,000 on this job (Tr. 1080)."

Mr. Waltie and Mr. Hunter substantiated the testimony concerning these meetings (Tr. 694, 695, 696, 698, 922, 923).



Reference has been made by opposing counsel to the testimony of H. T. Nelson, an assistant director of the Bureau of Reclamation, that there was an over-run of concrete of 14.5 per cent which indicates that there was a loss of concrete between the time it left the mixer and was placed into the forms. He testified that a portion of this loss could be accounted for as spillage and small losses in handling, but that the major portion of it would be represented by excesses required by forms larger than specified, and excavations below the specified grade (Tr. 1536, 1537). He admitted that an inspector of the Bureau of Reclamation was required to approve the structures before concrete was poured in there (Tr. 1357). There was very little spillage on this project (Tr. 557, 558).

The testimony relating to the correct amount of Schaefer's recovery is analyzed under heading V of this brief and the facts will not be stated in detail at this point. Two exhibits should be mentioned, however, which have an important bearing upon the amount of Schaefer's recovery. Exhibit 63 was prepared by a certified public accountant at Mr. Schaefer's request, from the records of his company. It itemizes Schaefer's costs and expenses by months and formed the basis of the trial court's decision (Tr. 103, 104, 112, 1240, 1241 to 1252). Exhibit 51 is a chart prepared by Schaefer showing the percentage of his total performance each day in the various classifications of the work, and the number of men employed each day in each classification (Tr. 572, 586). The estimated performance also appears on

this chart, and when this is compared with the actual performance, the delays to which Schaefer was subjected by Macri Company's failure of performance will be readily apparent. One striking feature of Exhibit 51 is that it indicates that during the final 30 days of the job Schaefer was able to pour 30 per cent of the entire amount of concrete required, and during the final month he was able to strip the forms from 39 per cent of the completed structures. A further analysis of this exhibit under heading V indicates that this demonstrated capacity on Schaefer's part to perform his contract, establishes that he could have performed all of the work required of him within from three and one half to four months. This would have been within the estimate of two witnesses, P. L. Darcy and L. E. Bufton, and indicates that the delay in completion of the project was not brought about by any fault or incapacity on the part of Schaefer.

It should be mentioned that there is an inaccuracy in the transcript, page 1723, in reporting the testimony of Mr. M. C. Schaefer. In the fourth line from the top of that page his answer is stated to be that 40 batches of concrete were poured in March, 1945. This should have been reported and transcribed as 400 batches. Exhibit 51 indicates that 30 per cent of the entire quantity of concrete was poured in that month. 30 per cent of the total amount poured, 1,356.697 cubic yards, is 407 cubic yards. The latter figure corresponds with the testimony of Mr. Schaefer in that he testified that a batch contained slightly more than one cubic yard (Tr. 1717).

In January, 1945, a meeting was held in Seattle attended by Mr. Sam Macri, Mr. Schaefer, and their attorneys, to arrive at a new price, if possible, for the work performed by Mr. Schaefer in the performance of the subcontract. They were unable to reach an agreement, but one part of their conversation should be recorded here. Mr. Holman, counsel for Macri Company, said, in answer to a question asked him by Mr. Schaefer, that if Macri Company was being paid for their excavations on the basis of a clearance of one foot out from the base of the completed structure and a slope of one to one, "You (Mr. Schaefer) may have a good legitimate claim against Sam Macri Company (Tr. 2022)." The government did pay Macri Company on the basis of excavations prepared with that clearance and slope, rather than on the quantity of earth actually removed (Tr. 1026, 1496, 1524, 2209).

## ARGUMENT

### Summary of Argument

I. Schaefer has a right to recover from Macri Company in quantum meruit, the reasonable value of all labor and materials furnished by him on this project, including overhead and profit, less what he has already received, for the reason that Macri Company were guilty of willful, total breaches of the subcontract.

II. Schaefer has a right to recover from Macri Company in quantum meruit, the reasonable value of the labor and materials supplied by him, including overhead and profit, for the reason that Mr. Macri promised to

pay Mr. Schaefer's costs under such circumstances that the doctrine of promissory estoppel precludes Macri Company from denying the enforceability of such promises. There was a total breach of such promises.

III. Schaefer has a right to recover from Macri Company in quantum meruit, the reasonable value of the extra labor and materials furnished by him, including overhead and profit, for the reason that Macri Company became obligated by an implied in fact agreement to pay that amount and were guilty of a total breach of that agreement by failing to do so.

IV. The findings of fact of the trial court with respect to the question whether Macri Company were guilty of breaches of the subcontract, are supported by substantial evidence and are, therefore, not clearly erroneous.

V. The judgment against Macri Company should be affirmed for the reason that the evidence establishes that the amount of the judgment correctly represents the sum to which Schaefer is entitled.

VI. Schaefer is entitled to a decision that he had capacity to sue in the District Court.

VII. Schaefer has a right to a judgment against the Continental Casualty Company in the same amount as the judgment against Macri Company, inasmuch as he has a right to recover from Macri Company under principles of contract law, and the amount of the recovery should be the same against both. The items allowed by the trial court are within the liability of the Continental Casualty Company as surety for Macri Company.



I.

**SCHAEFER IS ENTITLED TO RECOVER FROM  
MACRI COMPANY IN QUANTUM MERUIT, THE  
REASONABLE VALUE OF THE LABOR AND  
MATERIALS FURNISHED BY HIM, LESS THE  
AMOUNT HE HAS RECEIVED, DUE TO MACRI  
COMPANY'S WILLFUL BREACHES  
OF THE SUBCONTRACT**

The basis for this contention is that the trial court found, and there is substantial evidence tending to establish, the following facts: (1) Macri Company were guilty of willful and negligent, material breaches of the subcontract throughout the performance of the work by Schaefer, in the respects mentioned in the Statement of Case. (2) Schaefer furnished labor and materials and performed services for Macri Company at their request of the reasonable cost and value stated in the trial court's findings of fact (Tr. 103, 104).

It is established beyond any doubt that where one of the parties to a contract is guilty of a material breach, the injured party may recover the reasonable value of the labor and materials which he furnished to the other party, in quantum meruit.

(1) *United States v. Zara Contracting Co.*, 146 Fed. 2d. 606 (C.C.A. 2). This was an action under the Miller Act. The plaintiff, a subcontractor agreed to do all excavating on a project. He encountered unexpected difficulty due to the character of the soil. As a result his progress became slow and the defendant, the general



contractor, took over the excavating and finished the job, claiming that the plaintiff had breached the subcontract. In this action the plaintiff sought to recover in quantum meruit the reasonable value of the work performed by him, on the ground that the defendant had breached the subcontract. A judgment for the plaintiff against the defendant and its surety was increased and affirmed on appeal. The court said that a promisee, after a breach by the promisor, may forgo any suit on the contract and claim the reasonable value of his performance. The court added that the promisee under these circumstances is not limited in his recovery to the contract price.

(2) *McDonald v. Supple*, 96 Or. 486, 190 P. 315. The plaintiff's decedent agreed to assemble certain dredge hulls for the defendant at stated prices. The defendant was guilty of numerous breaches of the contract with the result that the decedent's performance became extremely burdensome to him and his costs were two or three times greater than they otherwise would have been. The court affirmed a judgment in favor of the plaintiff based upon the reasonable value of the services performed by the decedent. The court said that the defaults on the part of the defendant in the performance of the original contract were so numerous and so vital that they caused the decedent to perform his labor under different conditions, at a different time and in a different manner than originally contemplated which rendered the performance so burdensome that he was not required to accept the compensation fixed in the original contract.

(3) *Great Lakes Construction Co. v. Republic Creosoting Co.*, 139 Fed. 2d. 456 (C.C.A. 8). The plaintiff, a subcontractor, agreed to construct the floor in a post office building. The defendant, general contractor, agreed to prepare the building for the floor by a certain date. The plaintiff was unable to complete the work because the defendant had not made the necessary preparation. Many months later the defendant stated that the location was ready and demanded that the plaintiff complete the floor. He refused to do so, however, unless the defendant increased his compensation, for the reason that the cost of labor and materials had increased materially in the intervening months. In this action under the Heard Act, the predecessor of the Miller Act, the plaintiff was permitted to recover in quantum meruit the reasonable value of the labor and materials furnished by him in the performance of his contract. The basis of the court's decision was that the defendant was guilty of a breach of contract in failing to make the building ready to permit the completion of the floor and that the plaintiff was justified in refusing to finish his performance after the long delay.

(4) *Nelson v. City of Seattle*, 180 Wn. 1, 38 P. 2d. 1034. Nelson entered into a contract with the City to regrade Denny Hill by the removal of earth. Nelson and Vigilant entered into a subcontract by which the latter agreed to receive the earth alongside barges in the bay, and to haul the earth into the bay and dump it. It was also agreed that Vigilant should be prepared to receive a quantity of 14,400 cubic yards daily, which would have

permitted completion of the entire project in one year. The subcontract stated that if the work extended beyond the year Vigilant should receive \$70.00 per day for his work thereafter, until the project was completed. The court held that because Nelson failed to move the dirt as rapidly as expected and because the work extended over a much longer period than was anticipated, Vigilant was not bound to accept \$70.00 per day for his compensation beyond the year. The court held that he was entitled to the reasonable value of his services for the entire period beyond the year for which Nelson was responsible, and affirmed the judgment awarding Vigilant \$129.00 per day for that period. The court said:

“\* \* \* it is not conceivable that Vigilant intended or that Nelson expected, that the former would for one half year longer perform a service for \$70.00 a day upon which he had bid at the rate of \$225.00 a day. So, it would seem to follow that, in so far as performance by Vigilant was delayed beyond one year through Nelson’s failure to deliver 14,400 yards of material a day, the former would be entitled to recover the reasonable value of its services.”

In the following cases the courts stated and applied the same principle and permitted a recovery in quantum meruit.

*Schuehle v. City of Seattle*, 199 Wash. 675, 92 P. 2d. 1109.

*Sofarelli Bros. v. Elgin*, 129 Fed. 2d. 785 (C.C.A. 4).

*Schwasnick v. Blandin*, 65 Fed. 2d. 354 (C.C.A. 2).

It is respectfully contended on behalf of Schaefer that these decisions govern this situation.

It is contented by counsel for Macri Company that there can be no recovery in quantum meruit in this case for these reasons: (1) Assuming that Macri Company were guilty of continuing total breaches of the subcontract, Schaefer elected to continue his performance and thereby waived his right to regard the breaches as total, and rendered them partial breaches of contract. (2) There can be no recovery in quasi contract following the waiver of such total breaches, and the only remedy available to Schaefer for the partial breaches of contract is a recovery of damages against Macri Company measured by the increased cost of Schaefer's performance due to such partial breaches of the contract.

In support of these contentions counsel for Macri Company rely upon Section 317 of the Restatement of the Law of Contracts, and the other authorities cited in their brief, pages 40 to 42. It is conceded by counsel for Schaefer that the principle relied upon by counsel for Macri Company is sound and that it does govern certain situations, but we respectfully contend that it should not be applied in the present case for the reason that the breaches of contract on the part of Macri Company were willful.

It is an established principle of contract law, having particular application to construction contracts, that a builder is entitled to recover the contract price even though there are some defects or omissions in his performance, if it can be said that he has substantially performed the contract. The owner is then entitled to sufficient compensation from the builder to permit the



defects to be corrected or the omissions to be supplied.

3 Williston on Contracts, Sections 805 and 842.  
*Patrick v. Bonthius*, 13 Wash. 2d. 210, 124 P. 2d.  
550.

*Wray v. Young*, 122 Wash. 330, 210 P. 794.  
*Edmunds v. Welling*, 57 Or. 103, 110 P. 533.

There is an exceedingly important limitation upon this principle, however. It is said by the text writers and it has been repeatedly held by the courts that the principle does not apply if the builder willfully fails or refuses to perform the contract in accordance with the plans and specifications.

In 3 Williston on Contracts, Section 805, it is said:

“Where the rule of substantial performance prevails it is essential that the plaintiff’s default should not have been willful; and the defects must not be so serious as to deprive the property of its value for the intended use nor so pervade the whole work that a deduction in damages will not be fair compensation.”

In *Patrick v. Bonthius*, *supra*, 13 Wash. 2d. 210, 124 P. 2d. 550, the limitation is stated in these words:

“The rule is for the benefit of the honest, skillful and prudent contractor who faithfully endeavors to live up to the terms of his agreement, but through mistake or inadvertence fails in unimportant particulars.”

In each of the following cases the court refused to apply the doctrine of substantial performance, because the failure of the builder to comply strictly with the plans and specifications, was willful.



*Golwitzer v. Hummel*, 201 Ia. 751, 206 N.W. 254.

*Typhoon Air Conditioning Co. Inc. v. Fried*, 147 Pa. Super. 605, 24 A. 2d. 926.

*Turner v. Henning*, 262 F. 637 (Ct. App. D.C.).

See also: *Casinelli v. Stacy*, 238 Ky. 827, 38 S.W. 2d. 980.

Section 357 of the Restatement states the effect of a willful breach in these words:

“(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or nonperformance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment \* \* \* for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if

(a) The plaintiff's breach or non-performance is not willful and deliberate; \* \* \*.”

This section of the Restatement and the three cases previously cited in a group, permit a plaintiff who has been guilty of willful breaches of a contract, to recover no more from the other party than the value of the net benefit conferred on that party by the plaintiff.

The significance of these principles relating to the effect of a willful breach of contract, may be briefly stated:

By reason of their willful breaches of contract, Macri Company would not have been entitled to rely upon the doctrine of substantial performance if Schaefer had not fully performed, and could not, therefore, have secured

full performance from Schaefer in accordance with the terms of the contract, and limited his recovery to damages in an amount sufficient to correct the defects or supply the omissions in Macri Company's performance.

That being so, Macri Company's only remedy for a failure of performance by Schaefer would have been an action based upon Section 357 of the Restatement, and their recovery would have been the net benefit conferred by Macri Company upon Schaefer. But the net benefit here was a minus quantity and the principles of quasi contract which give a remedy when necessary to avoid an unjust enrichment, declare that Schaefer should recover in quantum meruit from Macri Company the difference between the benefits conferred by each of these parties upon the other.

Stating this in another way, if Macri Company would not have been entitled to avail themselves of the doctrine of substantial performance, they would not have been entitled to limit Schaefer's recovery against Macri Company to an action for damages. This analysis leads to but one conclusion: If Schaefer would have had the right to limit Macri Company's recovery to the net benefit conferred upon him, because of their willful breach, Schaefer himself has the right to recover the net benefit conferred by him upon Macri Company, in quantum meruit. It is evident, therefore, that Section 317 of the Restatement was not intended to apply to this situation, and that Schaefer's right to recover damages for breach of the subcontract, is not his only remedy.

Section 347 of the Restatement provides:

*"Restitution of Value of a Performance Rendered by One Party as a Remedy for Total Breach by the Other.*

"(1) For the total breach of a contract, the injured party can get judgment for the reasonable value of a performance rendered by him, measured as of the time it was rendered, less the amount of benefits received as part performance of the contract and retained by him, if the requirements of the rules stated in Sections 348-357 are satisfied and if the performance so rendered was

"(a) a part or all of a performance for which the defendant bargained; \* \* \*."

The only rule among those stated in Sections 348 to 357 which might limit the right of Schaefer to recover in quantum meruit is found in Section 350 which contains these words:

*"Effect of Full Performance by the Plaintiff.*

"The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt; but full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt."

A substantial part of the obligation of Macri Company was unquestionably unliquidated at the time of commencement of this suit for the reason that litigation was necessary to determine whether Schaefer had the right to include overhead and profit as part of his costs and, if so, the amount of such overhead and profit

properly chargeable to the Macris.

*Nelson v. City of Seattle, supra*, 180 Wash. 1,  
38 P. 2d. 1034.

It is established that Schaefer's recovery in quantum meruit is not limited to his actual cash expenditures for labor and materials, but he may recover, in addition, reasonable overhead and profit. In other words, Schaefer is entitled to recover the amount Macri Company would have been compelled to pay in the open market for the labor and materials which were actually furnished by him. This is established by the following authorities.

Comment c following Section 347, states:

"If the plaintiff's performance is part of the very performance for which the defendant bargained as part of an agreed exchange, it is to be valued, not by the extent to which the defendant's total wealth has been increased thereby, but by the amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered."

There is an excellent discussion of this subject in 5 Williston on Contracts, Section 1480.

This measure of recovery was approved in the following cases:

(1) *United States v. Zara Contracting Co., supra*, 146 Fed. 2d. 606 (C.C.A. 2). The court held, in the language of the Restatement, that the plaintiff's performance was to be valued by the amount the services and materials supplied by the plaintiff, "could have been purchased from one in the plaintiff's position" at



the time they were supplied. A judgment for the plaintiff was increased and affirmed.

(2) *Schwasnick v. Blandin*, *supra*, 65 Fed. 2d. 354 (C.C.A. 2). In reliance upon the same section of the Restatement and 5 Williston on Contracts, Section 1480, the court held that the plaintiff could recover the reasonable value of his services, "measured by what he could have got for them in the market, and not by their benefit to the promisor."

(3) *Sofarelli Bros. v. Elgin*, *supra*, 129 Fed. 2d. 785 (C.C.A. 4). The court here allowed recovery of overhead.

(4) *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. 2d. 1034. The court allowed fifteen per cent for profit, "the going rate on City contracts."

If an injured plaintiff is entitled to recover the market value of the labor and materials furnished by him, it is clear that overhead and profit should be included in the sum awarded him, inasmuch as any one offering to furnish labor and materials in the open market naturally includes overhead and profit in the amount of his offer.

It is respectfully submitted, therefore, that Schaefer should recover in quantum meruit the amount allowed by the court, including overhead and profit, less what he has received. The correct figures have been determined under heading V.

It is contended by Macri Company that Schaefer is not entitled to recover because he failed to minimize his damages (Brief 57). Schaefer performed as he was



asked to do, and he did nothing he was not required to do, to complete that performance. It could hardly be said, therefore, that he failed to minimize his damages.

## II.

**SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY THE AMOUNT OF HIS CLAIM, FOR THE REASON THAT AN INJUSTICE CAN BE AVOIDED ONLY BY ENFORCEMENT OF MACRI COMPANY'S PROMISES TO PAY SCHAEFER'S COSTS AND EXPENSES, AND MACRI COMPANY IS ESTOPPED TO ASSERT THAT THEIR PROMISES ARE NOT BINDING UPON THEM, SUCH RECOVERY BEING IN QUANTUM MERUIT**

This contention is based upon the following established facts: From the beginning, Macri Company knew that they were not performing their duties in accordance with the specifications. They knew, furthermore, that Schaefer was refusing to perform any of Macri Company's work and that he was actually unable to do his own until Macri Company had completed what they were required to do. In this state of affairs, Mr. Macri promised "to do better". He also promised on two occasions to pay Schaefer's costs, but it is not entirely clear whether he promised to pay all of Schaefer's costs and expenses, or the additional costs and expenses made necessary by Macri Company's failure to perform their

obligations. There is evidence supporting each view, but it is entirely immaterial which is adopted, as the governing rules of law and extent of recovery are the same in each instance. The trial court intimated that he inclined toward the latter (Tr. 103, 2214, 2215), but he actually decided Schaefer should recover all costs and expenses less what he had already received (Tr. 103, 104, 112). Hereafter these promises will be stated to be simply, "to pay Schaefer's costs and expenses."

Macri Company should reasonably have expected that the promises to pay Schaefer's costs would induce Schaefer to do all of Macri Company's work which they left undone, in order that Schaefer might make certain that he could fully perform all of his own obligations. Macri Company knew that Schaefer himself had executed a performance bond and that he would have been liable to both Macri Company and the surety in the event of a default on his part. In that event, either the surety or Macri Company would have taken over Schaefer's obligations and performed his contract, with resulting loss of profits and prestige to Schaefer.

In reliance upon these promises, Schaefer continued to perform his duties and, in fact, completed everything he was required to do. In so carrying out his own work, Schaefer performed a considerable portion of Macri Company's duties which increased his costs to an amount between two and three times greater than would have been necessary if Macri Company had performed according to specifications. Macri Company did not "do better," and performance of the prime contract with

the government would have been delayed far beyond its actual completion, if Schaefer had not done a considerable portion of Macri Company's work. Macri Company, of course, received the full benefit of the labor and materials furnished by Schaefer.

The contention considered under this heading is based upon the principle stated in Section 90 of the Restatement of the Law of Contracts in these words:

*"Promise reasonably inducing definite and substantial action. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."*

1 Williston on Contracts, Section 139.

3 Williston on Contracts, Sections 679 and 689.

That principle was applied in the following decisions:

(1) *Albachten v. Bradley*, 212 Minn. 359, 3 N.W. 2d. 783. The plaintiff pressed the defendant for payment of a note. Finally, the defendant orally asked the plaintiff to wait until several months after an action on the note would be barred by the statute of limitations, although no mention was made of the statute. The reason given by the defendant for his request was that he expected to secure certain collateral from the bank by then. The defendant said, "You won't have to start an action to collect. You will not lose anything by waiting." The plaintiff did wait until after the action was barred, but the defendant then refused to recognize his obligation. The trial court directed a verdict in favor of the

defendant. On appeal the supreme court granted a new trial. The court said that the defendant's assurance that the plaintiff would not lose anything by waiting was in effect an agreement that the statute of limitations would not be asserted as a defense by the defendant, and held that the defendant was therefore estopped to plead the statute although it provided that no acknowledgment or promise should be evidence of a new or continuing contract sufficient to take the case out of the operation of the statute "unless the same is contained in writing signed by the party to be charged thereby."

(2) *Fried v. Fisher*, 328 Pa. 497, 196 Atl. 39. The plaintiff in that case leased certain premises to the defendants, partners, for a term. During the term the defendant Fisher desired to withdraw from the partnership and enter another business. He asked the plaintiff to release him, Fisher, from the obligations of the lease, and stated the reason for his request. The plaintiff said that he was perfectly satisfied to have the other partner assume the obligations of the lease. Fisher then withdrew from the partnership and went into another business. Thereafter the plaintiff brought this action against both of the partners to recover unpaid rent. The court held that the defendant Fisher was not liable to the plaintiff because of the application of the doctrine of promissory estoppel. The opinion of the court traces the history of the doctrine of promissory estoppel and cites and considers many cases.

(3) *Luther v. National Bank of Commerce*, 2 Wash. 2d. 470, 98 P. 2d. 667. The decedent was in poor health



and wished someone to take care of him for the remainder of his life in his home rather than in a hospital. The plaintiff was a nurse who was operating a private hospital. The decedent told her that if she would give up her hospital, come to live with him, nurse him throughout the remainder of his life and never send him to a hospital, he would provide her a good living, build and give her a home and if he should predecease her, will his entire estate to her. The plaintiff accepted his proposal in full and took care of him for ten years in his home. The decedent asked her to marry him when she moved into his home and she did so. The trial court, and on appeal the supreme court, enforced the oral agreement made by the decedent, granting specific performance to the plaintiff. The court held that the decedent's promise was supported by consideration, but added that the principle of Section 90 of the Restatement applied. The court said:

"It seems to us that it would be a gross injustice to deny respondent the benefit of her bargain, which she performed to the letter, merely because by operation of law the services which she rendered subsequent to marriage are held to be without consideration."

(4) *Alameda County Title Insurance Co. v. Panella*, 218 Cal. 510, 24 P. 2d. 163. The court held that the doctrine of promissory estoppel was not applicable in that case for the reason that the parties entered into a written contract after they made the oral agreement relied upon by the defendant to create the promissory estoppel. The court discussed the circumstances under which the doctrine should be applied, saying:



"The promisor may be estopped to raise the defense that a written contract can be modified only by a contract in writing or an executed oral agreement, in like manner as he may be estopped to plead the statute of frauds upon an original contract required to be in writing."

*Hanna State & Savings Bank v. Matson*, 53 Wyo. 1, 77 P. 2d. 621.

*Sessions v. Southern California Edison Co.*, 47 Cal. App. 2d. 611, 118 P. 2d. 935.

*Panno v. Russo*, ..... Cal. App. 2d. ...., 186 P. 2d. 452.

*Frey v. Corbin*, ..... Cal. App. 2d. ...., 191 P. 2d. 21.

*Raldne Realty Corp. v. Brooks*, 281 Mass. 233, 183 N.E. 419.

*In re First-Central Trust Co.*, 75 Oh. App. 1, 60 N.E. 2d. 503.

*Martin v. Dixie Planing Mill*, 199 Miss. 455, 24 So. 2d. 332.

In *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. 2d. 1034, 1041, the court said, with respect to a promise made without consideration:

"Nelson (the general contractor) was anxious to have the work progress with as great speed as possible. Hence his proposal to pay half the rental of the additional tug and allow Vigilant (the subcontractor) the use of the scow without charge. Vigilant having acted upon the oral agreement, Nelson could not thereafter withdraw from it."

It is evident that the facts of this case bring it within the operation of the principle stated in Section 90 of the Restatement and the cases cited. The result is that the promises of Macri Company to pay Schaefer's costs are

binding on them, and since they have not performed those promises Schaefer is entitled to pursue all appropriate remedies for breach of contract.

Macri Company have paid only about one-third of Schaefer's total costs and expenses shown by Exhibit 63, the audit which formed the basis for the judgment of the trial court (Tr. 104, 112, 1241, 1252), and, consequently, none of his extra costs and expenses. It is clear, therefore, that their failure to perform their oral promises constitutes a total breach of such promises within the meaning of Section 317 of the Restatement.

That being true, Schaefer is entitled to a recovery in quantum meruit, by reason of the principle stated in Section 347 of the Restatement, based on the value of the labor and materials furnished by him.

Section 347 states:

*"Restitution of Value of a Performance Rendered by One Party as a Remedy for Total Breach by the Other.*

"(1) For the total breach of a contract, the injured party can get judgment for the reasonable value of a performance rendered by him, measured as of the time it was rendered, less the amount of benefits received as part performance of the contract and retained by him, if the requirements of the rules stated in Sections 348-357 are satisfied and if the performance so rendered was

\* \* \* \*

"(b) rendered in reliance upon the other party's promise and of a kind sufficient to make that promise enforceable under the rule stated in Section 90."

The only rule among those stated in Sections 348 to 357 which might limit the right of Schaefer to recover in quantum meruit is found in Section 350 which contains these words:

*“Effect of Full Performance by the Plaintiff.*

“The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt; but full performance does not make restitution unavailable if any part of the consideration due from the defendant in return is something other than a liquidated debt.”

A substantial part of the obligation of Macri Company was unquestionably unliquidated at the time of commencement of this suit for the reason that litigation was necessary to determine whether Schaefer had the right to include overhead and profit as part of his costs and, if so, the amount of such overhead and profit properly chargeable to the Macris.

*Nelson v. City of Seattle, supra*, 180 Wash. 1, 38 P. 2d. 1034.

It is respectfully submitted, therefore, that Schaefer is entitled to a judgment against Macri Company for the reasons stated herein.

The correct amount of his recovery is determined under head V of this brief, on the basis of each view of the testimony with respect to the extent of Mr. Macri's promises. If he promised to pay all of Schaefer's costs and expenses, the latter should recover the reasonable

value of all labor and materials furnished by him, less what he has already received. If Mr. Macri promised to pay his additional costs and expenses, Schaefer should recover the reasonable value of all additional labor and materials furnished by him, plus the portion of the contract price remaining unpaid. In either event, he is entitled to overhead and profit in amounts proportionate to his recovery, for the reasons stated under heading I.

### III.

#### **SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY THE REASONABLE VALUE OF THE EXTRA LABOR AND MATERIALS FURNISHED BY HIM, ON THE BASIS OF AN IMPLIED IN FACT AGREEMENT TO PAY FOR THEM**

This contention is based upon these established facts. From the beginning Macri Company knew that they were not performing their obligations under the sub-contract according to the specifications and knew that Schaefer was doing a considerable portion of Macri Company's work. At the meetings of April 29th and June 15th, 1944, Mr. Macri asked Mr. Schaefer to perform a substantial portion of the work required to be done by Macri Company, particularly the fine grading. Mr. Schaefer refused to take over the fine grading. Mr. Macri promised, "to do better" after these meetings, but he failed to show any improvement. It was still necessary, therefore, that Schaefer do a substantial



amount of work required by the subcontract to be done by Macri Company, if the prime contract was to be finished within a reasonable time. Schaefer, accordingly, continued to do Macri Company's work and this was fully known to the latter. Macri Company accepted this work and secured the full benefit of it in the form of compensation from the Bureau of Reclamation. The work done by Schaefer beyond that which would ordinarily have been required of him by the subcontract, was not a gratuity on his part. He expected full compensation for it, and a reasonable man in the position of Mr. Macri should have understood that such was Mr. Schaefer's expectation.

In this situation it is believed that the authorities unanimously declare that Schaefer is entitled to recover from Macri Company the reasonable value of the extra labor and materials furnished by him, on the basis of an agreement implied in fact, and decisions support this conclusion.

Section 72 of the Restatement of the Law of Contracts contains these words:

“(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:

“(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

\* \* \* \* \*

“(2) Where the offeree exercises dominion over



things which are offered to him such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance \* \*."

The following illustration of subsection (1a) appears in the discussion following Section 72:

"A gives several lessons on the violin to B's child, intending to give the child a course of twenty lessons, and to charge B the price. B never requested A to give this instruction but plainly allows the lessons to be continued to their end, having good reason to know A's intention. B is bound to pay the price of the course."

In 1 Williston on Contracts, Section 36, the principle is stated in this manner:

"Even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable."

See also 1 Williston on Contracts, Sections 36 A, 91 and 91 A.

Section 36 A makes it clear that the principle applies to the sale of goods as well as the rendering of services. It is said therein:

"A seller may make an offer of goods which is accepted by taking them with knowledge that payment is expected."

The decisions fully support the principles set forth in the Restatement and Williston on Contracts.

(1) *Western Asphalt Co. v. Valle*, 25 Wash. 2d. 428, 171 P. 2d. 159. The defendant desired to bid on a gov-

ernment contract but had no figures with respect to the cost of asphalt paving, a substantial item. Knowing that the plaintiff had done considerable asphalt paving, the defendant asked the plaintiff for its figures for that work. The plaintiff had previously computed its bid from the same specifications, and distributed it to a number of other contractors who were bidding for the prime contract, in the hope that the plaintiff would be awarded a subcontract. The plaintiff, accordingly, gave its bid to the defendant, and the latter used it in completing his bid on the prime contract. The defendant was awarded that contract but did not give the plaintiff the subcontract. The plaintiff in this action sought to recover from the defendant the amount of profit which the plaintiff would have made if it had been awarded the subcontract. The defendant contended that by not bringing action against the other contractors to whom the plaintiff submitted its figures, the plaintiff indicated that it did not expect compensation from the defendant when it gave its figure to him. The jury returned a verdict for the defendant but the trial court granted a new trial. This ruling was affirmed on appeal on the ground that the evidence created a question of fact on the issue whether the defendant, as a reasonable man, should have understood that the plaintiff expected compensation if the defendant was awarded the prime contract.

(2) *Roberts v. Gerlinger*, 124 Or. 461, 263 P. 916. That was a suit for foreclosure of a mechanics' lien. The plaintiff and the defendant had previously discussed the digging of an oil well on the defendant's land, and there-

after the plaintiff proceeded to carry out the project. The defendant knew the well was being dug but did not object and did not claim that the plaintiff was not employed to do so until some time after the well was finished. A judgment for the defendant was reversed on appeal. The court held that the plaintiff was entitled to recover, saying:

“Where one performs for another, with the other’s knowledge, a useful service of a character usually charged for, and the person for whom the service is performed expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the services is implied.”

(3) *Vaught v. Charleston National Bank*, 62 Fed. 2d. 817, (C.C.A. 10). The president of a corporation served as such without salary. He performed many valuable services for the corporation, however, in addition to those customarily performed by a president serving without salary. The court held that he was entitled to reasonable compensation for such additional services, and allowed his claim in receivership proceedings. The court said that it could not reasonably be expected that the president, a lawyer, would devote a considerable part of his time in traveling from city to city, to refinance the corporation, without reasonable compensation.

In the following decisions the courts applied the same principle:

*Hooper v. O. M. Corwin Co.*, 199 Wis. 139, 225 N.W. 822.

*Collins v. Lewis*, 111 Conn. 299, 149 Atl. 668.

*Miller v. Stevens*, 224 Mich. 626, 195 N.W. 481.

*Callan v. Andrews*, 48 F. 2d. 118 (C.C.A. 2).

*Houston v. Monumental Radio*, 158 Md. 292,  
148 Atl. 536.

*Hendryx v. Turner*, 109 Wash. 672, 187 P. 372.

In the *Hendryx* case the court said that the law will imply an agreement to pay what the services are reasonably worth where there is no express agreement with respect to compensation.

It is true that there can be no implied in fact contract if the acts or expressed intentions of the parties are inconsistent with such a contract.

*Houston v. Monumental Radio*, *supra*.

In Macri Company's brief, page 44, it is suggested that there can be no implied in fact agreement on the part of Macri Company to pay Schaefer's costs or any part of them, for the reason that the expressed intentions of these parties are inconsistent with such an implied agreement.

Counsel quoted from that portion of the opinion, page 44, in which the court said he could not find that there was a meeting of the minds or an express contract that Mr. Schaefer was to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid the reasonable value of all his costs. The basis for this finding by the court was simply that Mr. Schaefer refused specifically to take over the fine grading and excavating when Mr. Macri offered to turn it over to him. The court added that Mr. Schaefer continued to complain, which he did, and stated that it is hard to conceive



how Mr. Schaefer would have had cause for complaint if he was to get paid for everything anyway. The court concluded by saying that Mr. Schaefer's conduct was not consistent with a meeting of the minds and an express contract that Mr. Macri was to pay Mr. Schaefer for the fair value of his services.

There are two very clear reasons why this finding of the court is not inconsistent with an implied in fact agreement that Macri Company was to pay Schaefer the reasonable value of the labor and materials furnished by him.

First, a finding that there was no express contract or meeting of the minds that Schaefer was to perform all or a part of the fine grading, simply means that there was no bilateral contract by the terms of which Schaefer promised to do that work. A finding that there was no bilateral contract and consequently no promise by Schaefer to do the work, is clearly not inconsistent with the existence of a unilateral contract by the terms of which an agreement may be implied in fact on the part of Macri Company, to compensate Schaefer for the work which he actually performed. It is conceded that Schaefer did not expressly agree to do any fine grading, but that does not mean that if, through necessity, he was compelled to do some fine grading in order to get the job done, he should not be compensated for it on the basis of a unilateral contract implied in fact.

Second, the refusal of Mr. Schaefer to undertake the fine grading was in answer to Mr. Macri's request that Mr. Schaefer take over all the fine grading and



excavating, not simply that he take over the fine grading required by reason of the defective condition of the excavations.

The court said that it was hard to understand why Schaefer should have cause for complaint if he was to be paid for all of his costs in any event. We respectfully wish to point out that it is not difficult to see how Mr. Schaefer had a cause for complaint. Macri Company's failure to perform their obligations under the subcontract led to delays and extended the performance of Schaefer's obligations from a normal period of between three and a half and four months to more than a year. This naturally added to Schaefer's costs as it required him to keep highly paid supervisors on this job for a period several times longer than was really necessary. Furthermore, it was the excessive costs which were forced upon Schaefer by Macri Company, willfully and negligently, which led to this lawsuit. If Macri Company had performed its obligations as it was bound to do by its own contract this would never have occurred.

In any event, whether the trial court was justified in making that remark or not, there is absolutely nothing in his findings which is inconsistent with the implied in fact contract relied upon by Schaefer. He was compelled to do the extra work in order that he might perform his own obligations under the subcontract, Macri Company stood by and watched him do it, accepted the work without protest, in fact urged him to go ahead and do the extra work, and received full benefit for the work done by being paid by the United States Government.

It is respectfully contended on behalf of Schaefer that a decision declaring that there was no implied in fact contract to compensate Schaefer for the extra work done by him, under these circumstances, would not only be an injustice to him, but would be contrary to all the authorities which have been discussed herein.

It is important to observe that the trial court in his opinion, quoted in Macri Company's brief, pages 44 and 45, does not deny the existence of an implied in fact contract. Actually, the court said:

"In other words, it is the view of the court that there was an implied contract, or perhaps it would be more accurate to say a quasi contract, that Mr. Schaefer was to be paid the fair and reasonable value of the performance of this contract under the conditions and with the extra burdens imposed upon him by Mr. Macri's breach."

Of course, there is a difference between an implied in fact contract and one implied in law or a quasi contract, but the court does not state with certainty which he found to exist. Plainly, therefore, he did not deny the existence of the implied in fact contract relied upon by Schaefer.

The cases cited by counsel for Macri Company in their argument with respect to this subject, pages 44 and 45, are of no value whatever in support of a contention that there is no implied in fact agreement in this case.

*Western Asphalt Co. v. Valle*, 25 Wash. 2d. 428, 171 P. 2d. 159, already discussed herein, is of course one of

the most important cases supporting the contention of Schaefer with respect to this question. The opinion plainly declares that an agreement of the character relied upon by Schaefer should be implied in fact from the circumstances of this case.

*Chandler v. Washington Toll Bridge Authority*, 17 Wash. 2d. 591, 137 P. 2d. 97, is of no greater benefit to Macri Company. The plaintiff in that case never did any work for the defendant or with its knowledge, and never entered into a contract with it. The court held in affirming a judgment entered in favor of the defendant as a matter of law, that the plaintiff was not entitled to recover against the defendant in quasi contract. The court expressly stated that the plaintiff "does not rely upon any contract implied in fact."

The remaining cases are equally inappropriate and do not merit discussion.

It is contended in Macri Company's brief, page 63, that Schaefer is not entitled to any recovery for extra work done by him for the reason that there was no compliance with the terms of the subcontract relating to the ordering of extras. It is said that the subcontract required Macri Company to determine in advance the amount to be allowed for such extras and to order the extra work in writing, specifying the prices to be paid.

It is respectfully submitted on behalf of Schaefer that the lack of compliance with the subcontract in these respects, is no defense to this action, for three reasons:

1. Section 3 of Article Three of the subcontract,

quoted in part in Macri Company's brief, page 9, does not apply to this case for the reason that the words, "any such alteration or deduction," in that quotation, refer to "alterations in or deductions from the plans and specifications" which are made by the owner or principal contractor pursuant to authority granted in the first paragraph of that section which is not quoted in Macri Company's brief. Here, no change was made by the owner or principal contractor in either the plans or specifications, of the sort contemplated by the first paragraph of Section 3 of Article Three. Instead, Macri Company failed to perform the obligations imposed upon them by the subcontract, and the extra work became necessary in order that Schaefer might carry out his own obligations.

2. Compliance with such formalities was waived by Macri Company by ignoring them at all times while accepting Schaefer's performance of the extra work.

The trial court expressly stated in his opinion that Mr. Macri "waived any and all requirements as to written notice contained in the contract, by his conduct (Tr. 2213)." This conclusion is amply supported by the evidence and the decisions. When Mr. Macri orally promised to pay the extra costs and expenses, he demonstrated considerable impatience, indicating that no further formalities would be observed by him and that none need be requested by Schaefer. His main thought was evidently to get the project in operation again. His words were, "I'll pay you for all the extras, just get going (Tr. 226)," and, "You're not going to have to wait



for anything any more. You just get back here and get going (Tr. 287).”

In *Ross Engineering Co. v. Pace*, 153 Fed. 2d. 35 (C.C.A. 4), the court held that the lack of written orders from the general contractor, although required by the contract, did not preclude the subcontractor from securing a judgment against the general contractor, where from the beginning these parties ignored the provisions in the subcontract with respect to written orders when additional work was requested.

3. Macri Company is estopped to assert now that there was no compliance with the formalities of the subcontract.

This contention is based upon the facts and principles of law set forth under heading II in this brief. These facts need not be repeated. It should be emphasized, however, that during the conversations at the job site between Mr. Schaefer and Mr. Macri, when the latter promised “to do better” and to pay Schaefer’s costs, he also said that nobody had lost any money on his jobs and that nobody would lose on this one (Tr. 224, 286). Mr. Schaefer had a right to, and undoubtedly did, rely upon these words of Mr. Macri. From this statement and his promises to pay Schaefer’s costs, it may be inferred that Mr. Macri promised Mr. Schaefer that he, Mr. Macri, would pay Schaefer’s costs and expenses and that no defense would ever be raised that there was no compliance with the formalities required by the subcontract.

That is exactly what the court held in *Albachten v.*



*Bradley*, 212 Minn. 359, 3 N.W. 2d. 783, which was discussed at some length under heading II. It will be recalled that the plaintiff in that case was pressing the defendant for payment of a note. The defendant asked the plaintiff to wait until a specified date after an action on the note would be barred by the statute of limitations. To induce the plaintiff to grant this delay, the defendant said to him, "You won't have to start an action to collect. You will not lose anything by waiting." The court said that the assurance that the plaintiff would not lose anything by waiting was, in effect, an agreement that the statute of limitations would not be asserted as a defense by the defendant. The court held that the defendant was estopped to rely upon the statute.

It will be recalled that cases discussed under heading II establish that where the elements of a promissory estoppel exist, based upon an oral promise, the mere fact that the promise is oral does not prevent the application of the doctrine, although the Statute of Frauds may require that sort of promise be in writing.

*Lacy v. Wozencraft*, 188 Okla. 19, 105 P. 2d. 781.  
*Sessions v. Southern California Edison Company*,  
47 Cal. App. 2d. 611, 118 P. 2d. 935.

It is likewise no answer that a rule of law independent of statute, requires a promise of that character to be in writing.

*Alameda County Title Ins. Co. v. Panella*, 218  
Cal. 510, 24 P. 2d. 163.  
*Panno v. Russo*, .... Cal. App. 2d. ...., 186 P. 2d.  
452.

It is respectfully contended, therefore, that an enforceable, implied in fact contract came into being as a result of Schaefer's performance of the extra work, by the terms of which Macri Company promised to pay him the reasonable value of the labor and materials furnished by him in the performance of such extra work, and, in addition, reasonable overhead and profit.

Under heading I it was shown that Schaefer is entitled to disregard that contract and recover in quantum meruit the reasonable value of such labor and materials and overhead and profit, inasmuch as Macri Company's failure to pay for such labor and materials constituted a total breach of the implied in fact contract, Schaefer's claim being unliquidated. Schaefer can, of course, recover damages for breach of the implied in fact contract, but he prefers to rely upon his right to recover in quantum meruit because of the nature of this action.

The correct amount of Schaefer's recovery is determined under heading V.

#### IV.

**THERE IS SUBSTANTIAL EVIDENCE IN SUPPORT OF THE FINDINGS OF THE TRIAL COURT THAT MACRI COMPANY BREACHED THE SUBCONTRACT, AND THESE FINDINGS SHOULD THEREFORE BE SUSTAINED.**

Rule 52 (a) of the Rules of Civil Procedure declares that in all actions tried upon the facts without a jury,

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

This court has frequently stated and applied this Rule.

*Hartford Accident & Indemnity Co. v. Jasper*,  
144 Fed. 2d. 266 (C.C.A. 9)  
*Wingate v. Bercut*, 146 Fed. 2d. 725 (C.C.A. 9)

It has been held many times that findings of fact supported by substantial evidence may not be disturbed on appeal.

*U.S. Guarantee Co. v. Colonial Oil Co.*, 145 Fed.  
2d 496 (C.C.A. 5).  
*Andrew Jergens Co. v. Conner*, 125 Fed. 2d 686  
(C.C.A. 6).  
*Plack v. Baumer*, 121 Fed. 2d 676, (C.C.A. 3).

An extended discussion is not necessary to establish that there is substantial evidence in support of the findings of the trial court that Macri Company breached the subcontract. The court is simply referred to the Statement of Case in this brief.

Evidence establishing the correct amount of Schaefer's recovery is analyzed under heading V of this brief, and need not be considered here.

It is respectfully submitted that there is ample evidence to support the trial court's findings with respect to Schaefer's right to recover and the amount which should be awarded to him. These findings are therefore not clearly erroneous, and should be sustained.

V.

**THE EVIDENCE ESTABLISHES WITH REASON-  
ABLE CERTAINTY THE AMOUNT WHICH  
SCHAEFER IS ENTITLED TO RECOVER**

It has already been shown in the argument under headings I, II and III that Schaefer should be allowed to recover on three separate theories. These will now be considered separately to demonstrate that the amount of the judgment can be sustained on each.

I.

Recovery in quantum meruit of all Schaefer's costs and expenses, together with overhead and profit, based upon Macri Company's wilful and continuing breaches of the subcontract.

The trial court stated in his findings of fact that the value of the labor and materials furnished and services rendered for which Macri Company was chargeable, was as shown in Exhibit 63, the audit prepared by a certified public accountant at Schaefer's request; and the court allowed all the items set forth therein with the exception of interest and two other minor items (Tr. 103, 104). Counsel for Macri Company have not attacked the accuracy of this audit nor have they contended that it does not truly show Schaefer's actual costs and expenses. They do insist that Schaefer should not be permitted to recover overhead and profit, but that contention has been answered under heading I.

There is substantial evidence establishing the items



of overhead and profit. The accountant who prepared Exhibit 63 testified that he fixed overhead at 20% of the total direct costs because the true percentage, which he ordinarily used, was too high for a business of this kind (Tr. 1239, 1251, 1259, 1269). This was undoubtedly due to Schaefer's experience on this project. The accountant then stated that he computed the profit at 10% of the total of the direct costs and overhead, as most cost plus jobs in the construction field are figured on that basis. He added that it had been Schaefer's practice to bill on that basis, and to include overhead in his cost (Tr. 1272, 1273).

It cannot be seriously contended, therefore, that Schaefer has not met the burden of proof with respect to the measure of his recovery on the theory set forth under heading I.

It is respectfully submitted, therefore, that Schaefer's recovery should be computed as follows, if this theory is adopted.

(a) Schaefer's total direct costs allowed by the court	\$67,712.84
(b) Overhead — 20% of (a)	13,542.57
(c) Schaefer's total costs — (a) plus (b)	81,255.41
(d) Ten per cent profit	8,125.54
(e) Total costs, overhead and profit — (c) plus (d)	89,380.95
(f) Amount paid by Macri Company	32,614.66
(g) Total amount due and unpaid — (e) minus (f)	\$56,766.29



This figure varies slightly from the amount of the judgment due to an error in calculation at the conclusion of the trial.

## II.

Recovery based on the principle that an injustice can be avoided only by enforcement of Macri Company's promises to pay Schaefer's costs, and Macri Company are estopped to assert that their promises are not binding upon them.

As previously pointed out, it is not entirely clear whether Mr. Macri promised Mr. Schaefer to pay all of Schaefer's costs, or only his extra costs due to Macri Company's breaches of the subcontract. Even the opinion of the court and his findings of fact do not indicate with certainty which view he adopted. In fact, he may have adopted neither, but permitted a recovery in quasi contract instead, inasmuch as he allowed all of Schaefer's costs and expenses together with overhead and profit, less what he received.

If, under this theory, Schaefer is entitled to recover all of his costs and expenses together with overhead and profit, it is clear that the judgment should be affirmed, for the reasons stated in the previous subdivision.

If, on the other hand, Schaefer is entitled to a judgment for the amount specified in the subcontract, less what he received, and in addition thereto his extra costs and expenses, there is ample testimony in this record to support the judgment. The following discussion deals

only with the latter recovery, i. e., for the additional costs and expenses, and the corresponding overhead and profit.

It is contended on behalf of Macri Company that Schaefer failed to keep a separate account of his increased costs and that he failed to introduce any evidence of their extent at the trial. It is further contended that Schaefer, not having met the burden of proof, is entitled to recover nothing, inasmuch as the evidence shows Macri Company has already paid Schaefer almost all he would have been entitled to receive if the sub-contract had been faithfully performed by Macri Company.

There are two answers to these contentions, although it is conceded that Schaefer did not keep a separate account of his extra costs.

In the first place, the breach of contract by Macri Company was willful and negligent and was of such character as to render precise computations of extra costs economically and physically impossible.

The extra work done by Schaefer consisted in the following:

- (1) Fine grading the excavations to the proper level;
- (2) removing earth from the walls of the excavations to give them more slope and permit the forms to be inserted properly;
- (3) removing earth or cribbing and back-filling, where the walls were not properly excavated to the neat concrete line;
- (4) removing from excavations, panels assembled into structures, when it appeared that

the excavations had not been dug to the proper grade, and reassembling such panels in the excavations after additional fine grading; (5) removing the forms under adverse conditions after the concrete had set; (6) taking the forms back to the yard in order that they might be rebuilt, and returning them to the next excavation; (7) rebuilding panels to a different size because of a lack of lumber and the vertical walls of the excavations; (8) additional use of trucks; (9) additional use of other equipment; (10) additional supervision, that is, a superintendent and foreman were required for a much longer period than would have been necessary under normal conditions; (11) time lost in delay caused by Macri Company.

It is evident that from the nature of the operation and the extra work done, it would have been economically, and in many instances physically impossible to have kept an exact account of all these extra costs. Mr. M. C. Schaefer testified that in connection with the extra trips required to haul the forms from the excavation back to the yard and then on to the next excavation, it was a physical impossibility to establish a dividing line between what was contract and what was additional work (Tr. p. 1368).

In the second place, Schaefer did produce very substantial evidence of additional costs, and it is respectfully submitted that such evidence fully meets the requirements established by the Supreme Court of the United States which will be discussed.

This evidence consisted in the testimony of several

witness and Exhibits 51 and 63. Exhibit 51 shows the estimated time of performance of all aspects of his work: Constructing forms, pouring concrete, and stripping the forms. It also shows the daily progress of the work by means of cumulative percentages of the total to be done in each of these three categories. It also indicates exactly how many men were employed each day and in what work they were primarily engaged. Exhibit 63 is the audit prepared by the certified public accountant at Schaefer's request, setting forth all of his costs and expenses itemized by months.

Mr. L. E. Bufton, an engineer of uncommon experience in the field of concrete construction (Tr. 1133 to 1139), testified that after examining the specifications covering this job, the work required of Schaefer under the subcontract could have been performed by him, if Macri Company had performed their obligations under the subcontract, in not more than four months (Tr. 1160, 1161, 1162). He added that to accomplish this in four months, he would need an average of 25 men per day (Tr. 1216), which means, assuming 25 working days in each month, 2500 men days would have been required.

By means of a hypothetical question setting forth the principal details of the conditions under which Schaefer was compelled to do his work, Mr. Bufton was asked how and to what extent the conditions mentioned would affect the reasonable cost and value of the performance by Schaefer (Tr. 1167, 1168, 1169). His answer was that he could not state the additional



costs in dollars and cents but that he felt that the cost might be from two to three times as much as it should have been under normal conditions (Tr. 1172 to 1175).

Finally, Mr. Bufton said that he figured the reasonable cost and value of the performance of the work undertaken by Schaefer, assuming that Maori Company performed their obligations as required by the subcontract, would be \$27.88 per cubic yard. He added this figure included an allowance for the services of the subcontractor himself and overhead. By overhead he said he meant home office and general supervision (Tr. 1162, 1163, 1164). Mr. Bufton also referred to a similar project in Oregon. He said the subcontractor carrying out the concrete work had bid \$30.00 per cubic yard with the understanding that he furnish all the lumber for forms (Tr. 1141, 1142, 1143). Mr. Schaefer testified that his bid of \$26.00 per cubic yard would have been raised to \$30.00 if he had been required to furnish the lumber (Tr. 419). Thus their bids were in the same amount.

Mr. Darcy testified that if the excavations had been ready with the banks on a one to one slope and a lateral clearance of one foot at the foundation of the structure, and lumber had been furnished of proper quality and on time, no more than three and a half months at the very outside would have been necessary to complete the job (Tr. 464). Actually a year and three weeks were required.

Exhibit 51 established beyond contradiction that



this job could have been completed within three and a half months or at least within the four months specified by Mr. Bufton, if Macri Company had faithfully performed the subcontract. That exhibit shows the following actual performance by Schaefer during the periods indicated:

Form setting, from Feb. 9, 1945 to Mar. 8, 1945, the most productive month —  $17\frac{1}{2}$  per cent of the entire job.

Pouring concrete, from Mar. 1, 1945 to Mar. 30, 1945, the final 30 days — 30 per cent of the entire job.

Stripping forms, from Mar. 5, 1945 to Apr. 4, 1945, the final month — 39 per cent of the entire job.

These figures demonstrate that so far as pouring concrete and then stripping the forms was concerned, operations in which Schaefer was not directly dependent on Macri Company, Schaefer could have performed all of the work contemplated by the subcontract in 100 days of elapsed time. During no month was he able to construct in the excavations more than  $17\frac{1}{2}$  per cent of the entire number of forms required on this project, but it appears from Exhibit 51 that in seven days of actual time and eight days of elapsed time, from January 19, 1945 to January 26th, Schaefer's men were able to set  $6\frac{1}{2}$  per cent of the entire number of forms, and that on each of sixteen other days, widely scattered, they set one per cent or more of the total number.

Exhibit 51 establishes by means of the following

computation that Schaefer actually demonstrated the capacity to complete the work in the same or less time and with less men than Mr. Bufton estimated:

Form setting (including yard, form setting, field repair, and trucking crews) —  $6\frac{1}{2}\%$  of the work required 107 men days

Concrete pouring — 30% of the work required 176 men days

Form stripping — 30% of the work required 34 men days

All types of work — 100% would require 2,346 men days

One other fact is worthy of mention: The ratio of Schaefer's demonstrated performance of 2346 men days to Mr. Bufton's estimated performance of 2500, is 94/100. The ratio of Schaefer's bid per cubic yard of \$26.00 to Mr. Bufton's estimate of \$27.88, is 93/100. The significance of this fact is that it establishes that Schaefer's bid may properly be used as a basis for a computation of the amount for which the work could have been done.

Schaefer's extra costs may be determined with reasonable certainty from the testimony and exhibits just considered, by two separate computations:

1. Based on the difference between Schaefer's actual, total costs and his estimated costs.

- |  |    |       |
|--|----|-------|
| (a) Schaefer's bid, per cubic yard   | \$ | 26.00 |
| (b) Schaefer's estimated costs,<br>eliminating 10% profit but<br>not overhead — 10/11 of (a) |    | 23.64 |
| (c) Number of yards poured for<br>which compensation was paid                                |    |       |

to Macri Company — Exhibit 14 (Tr. 160)	1,356.697
(d) Schaefer's estimated costs, including overhead but not profit — (b) multiplied by (c)	32,072.32
(e) Schaefer's total, actual costs including 20% overhead — (c) of table in previous subdivision	81,255.41
(f) Schaefer's extra costs in- cluding 20% overhead — (e) minus (d)	49,183.09
(g) Ten per cent profit	4,918.31
(h) Total extra costs and profit — (f) plus (g)	\$54,101.40

To this should be added, of course, the amount which remains unpaid under the subcontract.

(i) Amount required by the sub- contract to be paid — (a) multiplied by (c)	\$35,274.12
(j) Amount paid by Macri Company	32,614.66
(k) Balance remaining unpaid — (i) minus (j)	2,659.46
(l) Total amount due and unpaid on this basis — (h) plus (k)	\$56,760.86

It will be observed that this is \$4.11 less than the amount of the judgment.

2. Based on Mr. Bufton's estimate that the total cost might be from two to three times as much as it should have been under normal conditions.

A figure of two and one half was adopted in making

this computation which means that the extra costs are assumed to be one and one half times the costs under normal condition.

(a) Schaefer's estimated costs, including 20% overhead but not profit — (d) of previous table	\$32,072.32
(b) Total costs based on Mr. Bufton's estimate of rate of increase, but Schaefer's estimate of costs, including 20% overhead — (a) multiplied by $1\frac{1}{2}$	48,108.48
(c) Ten per cent profit	4,810.85
(d) Total extra costs and profit — (b) plus (c)	52,919.33
(e) Balance remaining unpaid on sub-contract — (k) of previous table	2,659.46
(f) Total amount due and unpaid on this basis — (d) plus (e)	\$55,578.79

This is \$1,186.18 less than the amount of the judgment, but it would be substantially increased by using Mr. Bufton's estimated cost of \$27.88 per cubic yard, or adopting his estimated increase of three times the cost under normal conditions.

It is respectfully submitted that the evidence, as thus analyzed, fulfills the requirements of the Supreme Court with respect to the character of proof required to sustain a money judgment.

(1) *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 90 L.Ed. 1515, 66 S. Ct. 1187. That was an action for overtime compensation under the Fair Labor Standards Act. The Circuit Court of Appeals reversed a



judgment entered in favor of the plaintiff in the District Court, for the reason that the evidence of the extent of his overtime work was conjectural. The Supreme Court reversed the Circuit Court of Appeals and affirmed the judgment of the District Court, saying:

“The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of Section 11 (c) of the Act. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case ‘it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.’ *Story Parchment Co. v Patterson Parchment Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544. It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages. *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 377-379, 47 S.Ct. 400, 405, 71 L.Ed. 684; *Palmer v Connecticut Railway & Lighting Co.*, 311 U.S. 544, 560, 561, 61 S.Ct. 379, 384, 385, 85 L.Ed. 336; *Bigelow v. RKO Radio*



Pictures, Inc. 327 U.S. 251, 263-266, 66 S.Ct. 574, 579, 580."

(2) *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 90 L.Ed. 652, 66 S.Ct. 574. This was an action under the Sherman and Clayton Acts for an injunction and to recover treble damages. The Supreme Court affirmed the judgment for the plaintiffs entered in the District Court, although the evidence of damages sustained by the plaintiffs consisted simply in a comparison of the plaintiff's receipts before and after the defendant's wrongful acts. In reversing the Circuit Court of Appeals for the Sixth Circuit, the court said:

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof.' *Story Parchment Co. v. Paterson Parchment Paper Co.*, supra, 282 U.S. 561-564, 51 S.Ct. 250, 251, 75 L.Ed. 544; *Eastman Kodak Co. v. Southern Photo Materials Co.*, supra, 273 U.S. 377-379, 47 S.Ct. 404, 405, 71 L.Ed. 684. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

"Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

"The most elementary conceptions of justice and

public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp. v. Sealright Co.*, 2 Cir., 141 F. 2d 972, 979. That principle is an ancient one, *Armory v. Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. \* \* \*

“The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery’ for a proven invasion of the plaintiff’s rights. *Story Parchment Co. v. Paterson Parchment Paper Co.*, supra, 282 U.S. 565, 51 S.Ct. 251, 75 L.Ed. 544; and see also *Palmer v. Connecticut Railway Co.*, 311 U.S. 544, 559, 61 S.Ct. 379, 384 85 L.Ed. 336, and cases cited.

“The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondent’s action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners’ receipts before and after respondent’s unlawful action impinged on petitioners’ business afforded a sufficient basis for the jury’s computation of the damage, where the respondent’s wrongful action had prevented petitioners from making any more precise proof of the amount of the damage.”

It is respectfully submitted, therefore, that if this theory is adopted, the judgment should be affirmed.

### III.

Recovery based on the implied in fact agreement of Macri Company to pay Schaefer’s costs.

It is probable that the implied in fact agreement is

limited to an undertaking by Macri Company to pay all of Schaefer's additional costs and expenses. Inasmuch as his claim was unliquidated, he has a right to recover in quantum meruit or by specific performance of the agreement. In either event his recovery is the same, and the evidence amply justifies the affirmance of the judgment, as was pointed out fully in the discussion under the previous subdivision.

## VI.

### **SCHAEFER IS ENTITLED TO A DECISION THAT HE HAD CAPACITY TO SUE IN THE DISTRICT COURT**

Counsel for Macri Company contended at the trial and now assert on this appeal that Schaefer is not entitled to maintain this action for the reason that Schaefer failed to file the assumed name certificate required by Remington's Revised Statutes of the State of Washington, Section 9976, prior to the trial. It is said that this failure on his part precludes him from maintaining this action, by reason of the provisions of Section 9980 quoted in Macri Company's brief, page 59.

This contention has no merit whatever. Rule 17(b) of the Rules of Civil Procedure declares: "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."

See 6 Cyclopedia of Federal Procedure 147, Section 2099.

Schaefer resided and was domiciled in Portland, Oregon, when this action was commenced, when the amended complaint was filed and at the time of the trial. He also maintained his office in that City and State (Tr. 3, 178, 181).

The controlling question, therefore, is whether the law of Oregon has given Schaefer capacity to sue. The statutory requirements of Washington have no effect whatever upon its determination.

Counsel for Macri Company have never asserted that Schaefer has no capacity to sue because of his failure to meet any requirement of the Oregon law. By failing to make such contention either by motion or in their answer, Macri Company have waived the right to assert it.

Rule 9(a) of the Rules of Civil Procedure states:

"It is not necessary to aver the capacity of a party to sue \* \* \* except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to \* \* \* the capacity of any party to sue \* \* \* he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Schaefer complied with the requirement of the first sentence of Rule 9(a). The amended complaint contains sufficient averments to show the jurisdiction of the court in that it alleges every fact upon which the jurisdiction of the District Court depends under the Miller Act, and alleges a cause of action in favor of Schaefer under that act.



On the other hand, counsel for Macri Company have failed to comply with the requirement of the second sentence of Rule 9(a) in that they have never contended in a motion or in their answer that the law of Schaefer's domicile, the State of Oregon, has not conferred upon him the capacity to sue in the District Court.

All defendants had knowledge that M. C. Schaefer was an individual doing business as the Concrete Construction Company, that he was the sole owner of such business, and that he was a resident of the State of Oregon, inasmuch as these facts were alleged in paragraph II of his amended complaint, filed January 24, 1946 (Tr. p. 3). Actually, Macri Company admitted that allegation in their answer (Tr. p. 13), without questioning Schaefer's capacity to sue.

It is established that under these circumstances, counsel for Macri Company have waived the right to question the capacity of Schaefer to maintain this action.

*Trounstone v. Bauer, Pogue & Co., Inc.*, 144 Fed. 2d. 379 (C.C.A. 2), cert. den. 323 U.S. 777.

*Kucharski v. Pope & Talbot, Inc.*, 4 Fed. R. Dec. 208 (D. Ct. N.Y.).

*Chemacid v. Ferrotar Corp.*, 3 Fed. R. Dec. 45, (D. Ct. N.Y.).

It was held in *Kucharski v. Pope & Talbot, Inc.*, supra, that the defendant waived its right to object to the capacity of the plaintiff to sue, by failing to raise the question until after the statute of limitations had run against the plaintiff's claim. In the present case, the Miller Act itself, 40 U.S.C.A. Section 270 b, imposes a



limitation on actions brought under its provisions, of one year after the date of final settlement of the prime contract. The bar of the statute was complete, therefore, on March 31, 1946 (Tr. p. 104), approximately one year before the trial of this case was commenced.

This strengthens the conclusion that counsel for Macri Company have waived the right to raise this question.

It appears advisable, however, to state to this court what took place at the trial. At the beginning of his testimony on the first day of the trial, Mr. M. C. Schaefer admitted that he had not filed an assumed name certificate in Yakima, Washington. Opposing counsel then raised their first objections to Schaefer's capacity to sue, based upon Schaefer's failure to comply with the Washington statute. Three days later such a certificate was filed on his behalf, in Yakima County, Washington, and a certified copy of it was received in evidence as Exhibit 59 before the plaintiff rested (Tr. 670, 673). In offering this exhibit, counsel for Schaefer stated that he did not concede that it was necessary to file the certificate and, in fact, that the state law was entirely inapplicable (Tr. 670). The court said that he would consider that the amended complaint and Macri Company's answer were amended to show the filing of the certificate and that its sufficiency was questioned. There is nothing in the record indicating that either Macri Company or the Continental Casualty Company were misled or prejudiced in any way in their business dealings with Schaefer or in this litigation by reason of his failure to

file the assumed name certificate prior to trial.

It is respectfully contended, therefore, that Schaefer is entitled to a decision that he had capacity to sue in the District Court.

## VII.

### **SCHAEFER IS ENTITLED TO RECOVER FROM MACRI COMPANY AND CONTINENTAL CAS- UALTY COMPANY THE AMOUNT OF HIS CLAIM, UNDER THE MILLER ACT**

The basis for this contention is that it has already been demonstrated under the previous headings of this brief that Schaefer has a right to recover from Macri Company either the full amount of his costs and expenses, together with overhead and profit, less what he has already received, or the amount of his extra costs and expenses, together with overhead and profit, plus the sum remaining unpaid on the subcontract.

It is established beyond doubt that if, under the law of contracts, a subcontractor has a right to a judgment against the general contractor by reason of having furnished labor or materials in the prosecution of the work provided for in the prime contract for the construction of a public work of the United States, he, the subcontractor, is entitled to a judgment likewise against the surety on the payment bond of the general contractor, by reason of the terms of the Miller Act, 40 U.S.C.A., Section 270 a to 270 d.

In each of the following six cases it was held that the subcontractor was entitled to a judgment against the surety under the Miller Act for the reason that, under the law of contracts, the subcontractor had a right to recover from the general contractor.

(1) *United States v. Zara Contracting Co.*, 146 Fed. 2d. 606 (C.C.A. 2). In that case the court allowed a recovery against both in quantum meruit in reliance upon the general law of contracts.

(2) *United States v. John A. Johnson Contracting Corp.*, 139 Fed. 2d. 274, Cert. Den. 321 U.S. 797 (C.C.A. 3). The court allowed a recovery based upon the general law of contracts, in reliance upon the Restatement, Williston on Contracts and a number of decisions.

(3) *Great Lakes Construction Co. v. Republic Creamery Co.*, 139 Fed. 2d. 456 (C.C.A. 8). The court permitted a recovery in quantum meruit following a breach on the part of the general contractor.

(4) *Lange v. United States*, 120 Fed. 2d. 886 (C.C.A. 4). The court applied the law of contracts of Maryland and decided that a promise of the general contractor was supported by adequate consideration.

(5) *United States v. Standard Accident Ins. Co.*, 106 Fed. 2d. 200 (C.C.A. 7). In that case the court allowed a recovery of a sum considerably in excess of the amount specified in the subcontract, for the reason that the subcontractor and the general contractor entered into a binding contract by which the latter agreed

to pay a greater sum than that specified in the subcontract.

(6) *Royal Indemnity Co. v. Woodbury Granite Co.*, 101 Fed. 2d. 689 (Ct. App. D.C.). The court held that the surety of the general contractor is liable whenever the general contractor himself is liable.

It has been repeatedly held that a recovery may be allowed under the Miller Act against both the general contractor and his surety, for labor or materials furnished under orders or requests by the general contractor in modification of the subcontract.

(1) *Dow v. United States*, 154 Fed. 2d. 707 (C.C.A. 10). The subcontract provided that the banks of excavations should be vertical and that the subcontractor should perform his work as directed by the general contractor. The latter directed the subcontractor to cut the banks on a one to one slope and the subcontractor complied. The court held that the subcontractor was entitled to recover for the extra work done by him in cutting the banks on a slope.

(2) *Ross Engineering Co. v. Pace*, 153 Fed. 2d. 35 (C.C.A. 4). A recovery was allowed in that case for extras ordered orally by the general contractor, in spite of a provision in the subcontract that extra work should be ordered in writing.

(3) *United States v. Standard Accident Insurance Co.*, *supra*, 106 Fed. 2d. 200 (C.C.A. 7). The court enforced an express agreement to pay for extra work done by the subcontractor.



(4) *United States v. Otis Williams & Co.*, 30 Fed. Sup. 590 (D. Ct. Ida.). The plaintiff was permitted to recover for extra work required by changes made by the government.

(5) *United States v. Mathew Cummings Co.*, 27 Fed. Sup. 405 (D.Ct. Mass.) The plaintiff recovered for extra work orally ordered by the general contractor, in spite of a term in the subcontract which declared that no charges for extras would be allowed unless ordered in writing.

In conformity to the principle that if a subcontractor is entitled to a judgment against the general contractor under the law of contracts, he has a right to a judgment against the surety, it has been held that there need not be a bilateral contract between the subcontractor and the general contractor to justify a recovery against the latter and his surety, and that a unilateral contract is a sufficient basis for a recovery against both.

(1) *United States v. John A. Johnson Contracting Corp.*,, *supra*, 139 Fed. 2d. 274, Cert. Den. 321 U.S. 797 (C.C.A. 3). The court said that the judgment entered in favor of the subcontractor in the trial court could be sustained on either of two grounds: (a) The subcontractor's performance of the work created a unilateral contract. (b) His performance amounted to an acceptance of the general contractor's offer, thus creating a bilateral contract.

(2) *United States v. American Surety Co.*, 200 U.S. 197, 50 L. Ed. 437, 26 S. Ct. 168. This case clearly



establishes that it is immaterial under what sort of arrangement the labor or materials are furnished, a view which is plainly supported by the statute itself, 40 U.S.C.A., Section 270 b. The plaintiff in that case performed services for a subcontractor and not for the general contractor. The court held that the labor and materials thus furnished were within the obligation of the surety, saying:

“The obligation is ‘to make full payments to all persons supplying it (the general contractor) with labor or materials in the prosecution of the work provided for in said contract.’ This language, read in the light of the statute looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied.”

As already pointed out in the argument under the previous headings and in the previous discussion under this heading, a term in a contract that extra compensation will not be allowed unless the work is ordered in writing, does not prevent the recovery of the reasonable value of such extra work or the contract price for it, from the general contractor and his surety.

(1) *Ross Engineering Co. v. Pace*, supra, 153 Fed. 2d. 35 (C.C.A. 4). The court based its decision on the fact that from the beginning the parties ignored the provisions in the contract with respect to written orders, and held that such conduct amounted to a waiver of the contract requirement.

(2) *United States v. Mathew Cummings Co.*, supra, 27 Fed. Sup. 405 (D. Ct. Mass.)

There may be a recovery against the general contractor and his surety, of the contract price, where the only breach has been the failure to pay for the labor or materials.

(1) *Anderson v. United States*, 151 Fed. 2d. 945 (C.C.A. 9) Here recovery was permitted on a written agreement modifying the original contract.

(2) *Royal Indemnity Co. v. Woodbury Granite Co.*, supra, 101 Fed. 2d. 689 (Ct. App. D. C.). The court held that the surety of the general contractor is bound by the contract price in a suit by a subcontractor, except in a case of collusion, fraud or such overreaching as will shock the conscience.

There may be recovery against the general contractor and his surety in quantum meruit for the reasonable value of the labor and materials furnished, where the general contractor has been guilty of a breach of contract.

*United States v. Zara Contracting Co.*, supra 146 F. 2d. 606 (C.C.A. 2).

*Great Lakes Construction Co. v. Republic Creosoting Co.*, supra, 139 Fed. 2d. 456 (C.C.A. 8).

The measure of recovery in an action against the general contractor and his surety based upon the furnishing of labor or materials, is not simply the value of the benefit conferred upon the general contractor, but is the value of the labor or materials in the open market. If the market value is adopted as the measure of recovery, it is evident that such recovery shall include reasonable overhead and profit in addition to actual

expenditures, inasmuch as any one offering to furnish labor or materials in the open market will include overhead and profit in figuring the amount of his offer.

*United States v. Zara Contracting Co.*, supra, 146 Fed. 2d. 606 (C.C.A. 2).

The court is referred to the discussion of this principle of contract law under heading I, and to the authorities there cited. The cases considered were not brought under the Miller Act, with the exception of the Zara case, but the principle is equally applicable to either sort. For reference, these authorities are cited again.

Restatement of the Law of Contracts, Section 347 (1) (a) Comment c.

3 Williston on Contracts, Section 1480.

*Sofarelli Bros. v. Elgin*, 129 Fed. 2d. 785 (C.C.A. 4).

*Schwasnick v. Blandin*, 65 Fed. 2d. 354 (C.C.A. 2).

*Nelson v. City of Seattle*, 180 Wash. 1, 38 P. 2d. 1034.

The only question remaining is whether Schaefer's recovery under the Miller Act may properly include all the items which were allowed by the trial court. It appears advisable to first cite the cases which declare what expenditures are proper elements of a recovery against the surety on the general contractor's payment bond.

(1) *Brogan v. National Surety Co.*, 246 U. S. 257, 62 L. Ed. 703, 38 S. Ct. 250. Groceries furnished to the general contractor to provide board for his em-

ployees, were held to be proper items for the reason that the general contractor found it necessary to furnish board. The court said that the statute must be construed liberally in favor of those who furnish labor and materials and added that it had repeatedly refused to limit the act to labor and materials directly incorporated into the public work itself. The court gave the following examples of proper items: cartage and towage of material; drawings and patterns used in making molds; labor although at a considerable distance from the construction site, including the labor of those making repairs of facilities; rental of equipment belonging to another; expenses of loading materials, and freight to the place where used.

(2) *United States v. Zara Contracting Co., supra*, 146 Fed. 2d. 606 (C.C.A. 2). Rental paid to another for use of his equipment was held to be proper.

(3) *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 Fed. 2d. 527 (C.C.A. 5). Expenditures for gasoline and oil used in necessary trucks were held to be recoverable.

(4) *United States v. Seaboard Surety Co.*, 26 Fed. Sup. 681, affirmed 106 Fed. 2d. 355 (C.C.A. 9). The cost of workmen's compensation insurance is a proper item.

(5) *United States v. Ambursen Dam Co.*, 3 Fed. Sup. 548 (D. Ct. Cal.). Minor and incidental repairs which are made necessary by the use of machinery in the prosecution of the work, are within the obli-



gation of the bond as are steel, nuts, bolts and washers.

"Labor (Tr. 1252)," "Batching (Tr. 1256, 1297, 1328)," "Payroll insurance (Tr. 1253)," "Payroll taxes (Tr. 1254)," are all allowable as labor. Batching represents the mixing of aggregate by another company. The items of payroll insurance and taxes are allowable on the principle of necessity, as labor can not be employed without making such payments. "Truck hire (Tr. 1254, 1296)," and "Equipment rental (Tr. 1254)," are allowable as they represent sums paid for the rental of equipment belonging to others. "Small Tools (Tr. 1254)," and "Hardware (Tr. 1255)," are proper as expendable items. "Equipment repair and maintenance (Tr. 1254, 1298)," are allowable as minor repairs made necessary by the use of machinery. "Gasoline (Tr. 1255)," and "Oil (Tr. 1255)," are allowable as expendable supplies. "Form oil," "Metal pipe plugs" which were made especially for use on this job, "Hunt Process and Sealcure (Tr. 1255)," "Sisalkraft Paper," "Lumber for cement shed," and "Roofing for cement shed (Tr. 1256)," are proper as materials used in the prosecution of the work, the first four of these items being used in the actual construction of the concrete structures, and the last two being incorporated in a cement shed used by Schaefer. The remaining items should be included as necessary expenses.



Answer to Contentions of Continental Casualty  
Company that there is No Liability on its Bond.

Several cases bearing on the question of its liability, are cited in its brief.

*United States v. Seaboard Surety Co.*, 26 Fed. Sup. 681 (D. Ct. Mont.). The plaintiff, a subcontractor, sought by this action to recover profits lost by it due to the delay of the general contractor. The latter was compelled to discontinue work because of insolvency. The plaintiff then refused to perform further and his surety completed the work. The court held that the plaintiff was not entitled to recover damages for loss of profits.

This case has no application to the present situation for the reason that Schaefer is not attempting to recover damages for loss of profits which he might have earned under other circumstances than those which actually existed. Schaefer is attempting to recover an item of profit in order that his total recovery may amount to the market value of the labor and materials furnished by him.

*L. P. Friestedt Co. v. U. S. Fire Proofing Co.*, 125 Fed. 2d. 1010 (C.C.A. 10). This case is likewise inapplicable for the reason that it was an action for damages for breach of contract which is indicated in the first paragraph of the quotation in the Continental Casualty Company's brief, page 57. The opinion further indicates that the plaintiff was not attempting to recover in quantum meruit. The only decision relied upon by the court was

the Seaboard Surety Company case just discussed which was clearly an action for damages for breach of contract.

In the last paragraph of the quotation appearing on page 58 of the brief, the court said that there could be no recovery for the reason that the extra work for which the plaintiff sought recovery did not arise under the contract but outside of it for the reason that the extra work was made necessary by the general contractor's failure to perform his duties under the subcontract.

*United States v. Maryland Casualty Co.*, 54 Fed. Sup. 290 (D. Ct. La.), affirmed 147 Fed. 2d. 423 (C.C.A. 5). The plaintiff here sought damages for breach of contract and not the reasonable value of labor or materials furnished by him.

*United States v. John A. Johnson & Sons*, 65 Fed. Sup. 514 (D. Ct. Md.). Here also, the subcontractor sought to recover damages as such, resulting from the general contractor's breach of contract. The court relied upon the Friestedt case in stating that the subcontractor was not entitled to recover from the surety. It appears that the real basis for the court's decision, however, was the fact that the subcontractor was proceeding improperly in attempting to assert his rights by means of a counter-claim filed in a suit pending against the surety. In any event, in discussing the merits of the controversy, the court fell into the same error as the court in the Friestedt case by declaring that a subcontractor is not entitled to recover for anything except "labor and material actually called for by the contract between the

general contractor and the government, which is made a part of the contract between the general contractor and the subcontractor."

These four cases were cited by the Continental Casualty Company in support of its contention that Schaefer is not entitled to recover from it because the work done by him does not fall within the classification of "labor and material in the prosecution of the work provided for in said contract (the prime contract)," or if any of such work was within such classification there is no evidence segregating that portion from the remainder (Brief 48, 49).

Here also, it must be borne in mind that Macri Company were guilty of willful breaches of the subcontract. Stating this in another way, Macri Company voluntarily turned over part of their work to Schaefer who did what was required to be done to complete the project, under the conditions which existed. Everything done by him was "work provided for in said contract," when those words are given their natural, normal meanings. When his men fine graded an excavation, carried forms back to the yard for repairs, or did anything else which Macri Company imposed on them, they performed "work provided for in said contract" as surely as when they poured concrete. Everything done by him contributed to the completion of the project. He completed the job in the only way it could have been done. The mere fact that the cost of doing it as he did, was greater than his cost would have been normally does not mean

that the work was not of the kind "provided for in said contract."

If the courts deciding the Friestedt and Johnson cases believed that there can be no recovery from the surety, of the reasonable value of extra labor and materials actually furnished by a subcontractor under such circumstances as to permit a recovery against the general contractor, simply because they are supplied by him because of the general contractor's default, it is respectfully submitted that these courts were mistaken in their view of the law. The Supreme Court of the United States had previously held in the case of the *United States v. American Surety Co.*, *supra*, 200 U. S. 197, 50 L. Ed. 437, 26 S. Ct. 168, that the statute is concerned with the protection of those who furnish labor and materials to the project, and not with "the particular contract or engagement under which the labor or materials were supplied." It is contended, therefore, that the mere fact that the subcontractor may have performed the obligations of another in furnishing labor and materials, does not mean that he can not recover the value of them from the surety.

This view finds added support in the cases already cited under this heading, and particularly in each of the following:

(1) *United States v. Mathew Cummings Co.*, 27 Fed. Sup. 405 (D. Ct. Mass.). Equipment furnished by one contractor was defective and it was necessary for the plaintiff, another subcontractor, to do extra work to put it in proper condition. The court held that the plaintiff



was entitled to recover for the work done in reconstructing such equipment.

(2) *United States v. Otis Williams & Co.*, 30 Fed. Sup. 590 (D. Ct. Ida.). The plaintiff, a subcontractor, performed certain work on a canal. When partly through the project, the government officers relocated it and the plaintiff's work became more difficult and extended over a greater period of time. The court held that the plaintiff was entitled to recover a sufficient sum to make him whole.

There is no reason whatever for adopting a forced and unreasonable construction of the Miller Act and this bond, in the face of the positive assertions of the Supreme Court that the statute and the bond must be liberally construed in determining who is protected thereby and for what items.

*Standard Accident Ins. Co. v. United States*, 302 U. S. 442, 82 L. Ed. 350, 58 S. Ct. 314.

*Brogan v. National Surety Co.*, 246 U. S. 257, 62 L. Ed. 703, 38 S. Ct. 250.

With respect to the fact that some of Schaefer's men were idle part of the time because of Macri Company's breaches of contract, it must be conceded that this idleness was a minor part of Macri Company's imposition on him. He could not discharge his men on each occasion they were required to wait. Consequently, he is entitled to recover the full amount of wages paid them on the principle of necessity heretofore discussed under this heading. Furthermore, the contention of the Continental Casualty Company that because there



was no evidence segregating the amount of wages paid for idle time, from the remainder, Schaefer is not entitled to recover anything, has been fully answered in the argument under heading V. It would seem to be in keeping with the Supreme Court's decisions, to declare that a paid surety, who has presumably made an investigation of his principal, assumes the risk of the principal's willful breaches of contract which render exact proof of the extent of recovery impossible, rather than the one who in the utmost good faith performs his obligations in reliance on the integrity of the principal and his surety.

Finally, it is contended by the Continental Casualty Company that Schaefer is not entitled to recover the item of profit. In the cases listed in support of that contention in its brief, page 68, only the first, second and fifth have anything whatever to do with that question.

*United States v. Davidson*, 71 Fed. Sup. 401 (D. Ct. Ida.). In entering judgment for the subcontractor, the court disallowed an item for profit, without any discussion of the question and without citing any authorities.

*United States v. Great American Indemnity Co.*, 30 Fed. Sup. 613 (D. Ct. N. H.). Here also the trial court in entering judgment for the plaintiff, a subcontractor, declined to include an award for profit. The court discussed the question and cited three cases, two of which have no bearing on the question. The third is considered below.

*Theobald-Jansen Electric Co. v. P. H. Meyer Co.*, 77

Fed. 2d. 27 (C.C.A. 10). Here the general contractor entered into an agreement with another company, the intervenor, by which the latter agreed to assume the obligations of the general contractor on a certain construction project, in return for half of the profit to be derived from it. The intervenor, after the work was completed, intervened in this action against the surety of the general contractor to recover the compensation which the latter had agreed to pay, namely, half of the profit to be derived from the project. The court denied a recovery, declaring that inasmuch as the general contractor could not sue his own surety, neither could the intervenor.

It is obvious that this decision is not an authority for the proposition that a subcontractor is not entitled to recover profit as an item making up the market value of his performance.

Respectfully submitted,

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Construction Company.

IN THE  
**United States Circuit Court**  
**of Appeals**  
**FOR THE NINTH CIRCUIT**

CONTINENTAL CASUALTY COM-  
 PANY, a corporation,

*Defendant and Appellant,*

*vs.*

THE UNITED STATES OF AMER-  
 ICA, for the use of M. C. SCHAEFER,  
 an individual doing business as CON-  
 CRETE CONSTRUCTION COM-  
 PANY,

*Plaintiff and Appellee,*

A. C. GOERIG and CLYDE PHILP,  
 individuals and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE  
 MACRI, individuals and co-partners,

*Defendants and Cross Appellants.*

No. 11707

**REPLY BRIEF OF CROSS APPELLANTS MACRI**

**UPON APPEALS FROM THE DISTRICT  
 COURT OF THE UNITED STATES FOR  
 THE EASTERN DISTRICT OF WASH-  
 INGTON, SOUTHERN DIVISION**

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## REPLY BRIEF OF CROSS APPELLANTS MACRI

### JURISDICTION

The jurisdictional point raised by appellee Schaefer has been previously decided by the court and an order entered on March 31, 1948, which order has become and is the law of the case on this appeal. The jurisdictional point raised by Macris (MB 1, 60) has not been answered by Schaefer.

### STATEMENT OF THE CASE

In reply to appellee's brief and to conserve space herein, we respectfully indicate that brief as "Schaefer's brief," with citation thereto as "SB" and the page. Similarly, we have indicated the brief of cross appellants Macri as "Macris' brief," with citation thereto as "MB" and the page.

The following astonishing assertion is found at the start of appellee's statement case (SB 4): "It is not claimed by anyone that any portion of Schaefer's work was done improperly, or that he was responsible for any delay in completion." Contrary thereto, two citations will suffice: A special sub-division "unskilled subcontract operations" at MB 71-72; and the statement at MB 14-17.

Similarly, appellee's statement of case concludes (SB 25) with a claim made by M. C. Schaefer at trial that one of Macris' attorneys had stated in a Seattle negotiation conference prior to trial: "You may have

a good legitimate claim against Sam Macri Company.” The transcript (Tr. 2023-2027) is a complete refutation of any merit to the quotation, any justification for using it or any trial court sanction thereto.

Between such a start and such a finish for the statement of case appellee’s brief employs consistently a method of indirection, evasion and generality. It quotes Schaefer witnesses’ interpretations of what Sam Macri and members of his field forces said, without giving the court benefit of the denial of those statements in the record by the latter. It avoids any answer to the presentation at MB 10-12 that a vast majority of the structures were small and shallow box structures without any bank excavation problem involved. It avoids any answer to the contents of the government inspectors’ *daily* field reports about Schaefer subcontract derelictions, as shown by Exs. 13a, b, c; 13d-1, incl.; 13m and subnumbers; 13o and subnumbers; and 13n (MB 19). Similarly, it avoids any answer to the government concrete engineer’s report shown by Ex. 17a (MB 18).

Appellee’s statement of case brushes aside the whole Nelson deposition presentation (MB 18-24) by a single paragraph (SB 23), referring to Nelson as “an assistant director” instead of the engineer actively in charge of 1062 field work as it progressed (MB 20). That paragraph (SB 23) is only one of confession and avoidance of the 14.5% overrun of concrete by Schaefer. It avoids Schaefer’s own expert Bufton’s statement that an overrun of concrete exceeding 5% would indicate unskilled operations (Tr. 1205, 1207; MB 72). and Hance’s undisputed testimony of variable widths of the Schaefer concrete walls (Tr. 1924; MB 72).

Similarly, appellee's statement avoids answering the appellant Continental Casualty Company's discussion of testimony of Schaefer's accountant Hendershott (Br. Con. Cas. 20-22, incorporated at MB 29) and Schaefer's intentional failure to keep costs (Br. Con. Cas. 13-17, incorporated MB 28).

At SB 8 an excerpt from the court's memorandum, regarding job staking by Macris' superintendent Ashley is quoted, notwithstanding the full statement as to Ashley's stakings with citation to the record at Tr. 1876-7, shows that such quoted reference thereto is inapt (MB 66).

We cannot, and do not, concur in the suggested change of the transcript record at p. 1723 from 40 to 400 batches of concrete, as mentioned in the last paragraph on p. 24 of the Schaefer brief to bolster the tabulation discussed at that point.

Appellee's statement of case is so replete with generalities from the record that space, as limited by this court's rules for reply briefs, will not permit any replying thereto in detail. We therefore must respectfully redirect the court's attention to MB 2-29, to appellant Continental Casualty Company's brief at pp. 13-17, 20, and 22, incorporated by reference thereto at MB 27-28, and particularly to the subcontract provisions at MB 5-10, incl., which are not covered in the Schaefer brief.

### REPLY TO ARGUMENT

The logical progression, the authoritative basis and the conclusions reached in the legal argument of the cross appellants Macri (MB 36-75) are uninterrupted and unweakened by the points and authorities raised in Schaefer's brief, it is submitted. Reply is made to

those points and authorities under the same Roman numeral heading as that given in the Schaefer brief for the convenience of the court. No reply is made herein to VII, counsel being willing to adopt such reply thereto as may be made by Continental Casualty Company.

## I.

Counsel for Schaefer concede as follows (SB 31): That Schaefer elected to treat any breaches by Macris as partial breaches and to continue performance of the subcontract, that there can be no recovery in *quasi* contract (*quantum meruit*), and that the only remedy available to Schaefer for the partial breaches of contract is for damages measured by the increased cost of his performance due to such partial breaches, *except*, counsel assert, Macris' breaches were wilful.

It is not conceded by Macris that they either breached the contract wilfully or otherwise (MB 2). In any event, however, it must be apparent that the point of wilfulness has no materiality on the question of whether or not those breaches were waived by Schaefer. See 12 *Am. Jur. Contracts*, Sec 390, quoted MB Appendix 1; 3 *Williston on Contracts*, Sec 687. The substantial performance doctrine is inapplicable. This doctrine is an equitable doctrine advanced to prevent forfeitures and hardships in situations where a claimant has been guilty of partial contractual breaches and would be precluded from recovering the contract price under strict law requiring that a contract must be fully performed, 12 *Am. Jur., Contract*, Sec. 343; *Patrick v. Bonthius*, 13 W. (2) 210, 124 P. (2) 550. Under that doctrine, the conduct of the party charged with contractual breach is material. But, in



the instant case, it is the conduct of Schaefer which is material, not the conduct of Macris or the wilfulness or involuntary nature of their asserted breaches. Schaefer could and did, as his counsel have conceded, elect to treat any breaches by Macris as partial breaches, whether or not such breaches are said to be wilful. It is noteworthy, but understandable, that counsel have cited not one case supporting their contention that the so-called wilfulness of Macris' breaches prevented such an election and waiver of the total nature thereof. One suspects that counsel for Schaefer dusted off this well-known doctrine of substantial performance simply because the term "wilful breach" is frequently used with it.

Manifestly, there is no unjust enrichment situation present (SB 34), for Schaefer's entire performance was for an agreed exchange—the contract price. Schaefer may not have made an advantageous contract, but by his own election he elected to keep the contract in effect, and his only available action is for damages. *U. S. v. Wyckoff Pipe & C. Co.*, 271 U. S. 263, 46 Sup. Ct. 503, 70 L. Ed. 938.

The cases cited by Schaefer (SB 27-30) are not apposite, as has been pointed out (MB 42-43), because they involve total breach situations where there has been no completion of the contractual performance and waiver of such total breaches, where the non-breaching party has exercised his election to rescind the contract and sue on *quantum meruit*, rather than electing to continue performance as Schaefer did in the instant case. The case of *Nelson v. City of Seattle*, 180 Wash. 1, 38 P. (2) 1034, (SB 30), in no sense expresses a contrary view.

Schaefer's contention as to the unliquidated character of Macris' performance (SB 35), is without merit. After completion of the performance of the contract by Schaefer the only consideration due from Macris was the payment of the balance of the contract price, a liquidated debt. The proper meaning and application of *Restatement of Contracts*, Sec. 350, is made clear by consideration of the comments and illustrations to that section and the fact situations of such cases as *Graves v. Smith*, 7 Wash. 14; *Stark v. Magnuson*, 2 N. W. (Minn.) (2) 814. The case of *Nelson v. City of Seattle*, *supra* (SB 36), is not in point.

The discussion (SB 36-38), concerning Schaefer's right to recover overhead and profit in *quantum meruit*, is irrelevant because he has no right whatsoever to recover in *quantum meruit* for work done in performance of the subcontract. *Nelson v. City of Seattle*, 180 Wash. 1, at page 9, 38 P. (2) 1034. As heretofore stated, Schaefer has conceded this proposition to be sound (SB 31). Under the cases of *Queen City Const. Co. v. Seattle*, 3 W. (2) 6, 99 P. (2) 407, and *Harris v. Morgensen*, 131 Wash. Dec. 198 (July 22, 1948), work done in the performance of a contractual obligation will not support even an express promise.

## II.

The trial court expressly found there was no modification of the written subcontract (MB 24). Schaefer contends he fully performed it (SB 4). Consequently, the doctrine of promissory estoppel as embodied in *Sec. 90 of Restatement of Law of Contracts* has no possible application to this case. This is true because

there would be no detriment sustained by Schaefer due to reliance upon any otherwise unenforcible promise by Macris. Rather, Schaefer's actions were plainly induced by the terms and conditions of the valid and binding subcontract which was in existence at all times during the performance of specifications 1062 and the terms of which were and are binding upon the parties. For any detriment or damage sustained by Schaefer because of any of the conduct of the Macris complained of, Schaefer is given the right to recover damages arising out of such breaches, provided he can with reasonable certainty prove the same (MB 50). Schaefer's performance of that which he was contractually bound to do cannot create an estoppel situation against the Macris. *Queen City Const. Co. v. Seattle*, 3 W. (2) 6, 99 P. (2) 407, and *Harris v. Morgensen*, 131 Wash. Dec. 198.

With respect to the additional costs and expenses, if any, made necessary by the Macris and referred to by appellee (SB 44), it is to an extent immaterial whether recovery for such items is considered under the heading of promissory estoppel, implied contract as discussed in the following section of appellee's brief, or, more accurately, as damages for a partial breach of the subcontract. The situation would be the same, that is, Schaefer has: (1) failed to comply with the subcontract terms for such additional recovery (MB 7-10, 15, 56, 57); (2) failed to present a bill or statement for such extra or additional recovery (MB 7-10, 63); and (3) failed entirely to prove at trial the amount of such additional or extra cost of performance or the reasonable value thereof (MB 52, 53).

Along with *Sec. 90 of Restatement of Law of Contracts*, Schaefer cites (SB 40-43) several cases wherein the doctrine of promissory estoppel has been applied by the court to prevent hardships or injustice, which is the only proper application for the doctrine. 1 *Williston on Contracts*, Sec. 139. Where the normal contractual remedies are available to a party, the doctrine of promissory estoppel has no place. 19 *Am. Jur., Contracts*, Sec. 53, 148. That is why, as in the instant case, an oral promise or assurance of performance of a prior written contract, such as Schaefer asserts was made by Macris, cannot raise the doctrine. Failure to carry out such assurances always constitutes a breach of the prior written agreement in and to the same extent for which all of the normal remedies for breach of contract are available. By the same token, there is no injustice to Schaefer here for he is admittedly entitled to recover his damages under the normal rules of damages if he proves a breach of the subcontract, and proves his damages. How, in good conscience, can Mr. Schaefer insist that there is an injustice unless he recovers more than what he agreed to accept for his performance plus any additional cost to him in rendering his performance?

The contentions by Schaefer at SB 44-45 have already been answered. The district court held that there was no such binding oral promise or promises as alluded to (Tr. 2214-15); the doctrine of promissory estoppel has no application, as just stated; and Macris' obligation remaining due under the subcontract after performance by Schaefer was a liquidated one. *Restatement of Contracts, Sec 350, Comment (b)* and illustrations.



## III.

It is submitted for the court's consideration, that in the face of the written subcontract between Macris and Schaefer, upon which Schaefer's entire performance was predicated, no such implied in fact agreement as that contended for by Schaefer is possible (SB 47).

Counsel for Schaefer cannot do less than admit that every dollar spent by Schaefer for labor and materials on job 1062 was spent in the performance of or in order to perform Schaefer's subcontract with Macris. In fact, it is so contended by them:

" \* \* \* Here, no change was made by the owner or principal contractor in either the plans or specifications, of the sort contemplated by the first paragraph of Section 3 of Article Three. Instead, Macri Company failed to perform the obligations imposed upon them by the subcontract, and the extra work became necessary in order that Schaefer might carry out his own obligations." (SB 56)

" \* \* \* Everything done by him (Schaefer) was 'work provided for in said contract,' when those words are given their natural, normal meanings. When his men fine graded an excavation, carried forms back to the yard for repairs, or did anything else which Macri Company imposed upon them, they performed 'work provided for in said contract' as surely as when they poured concrete. Everything done by him contributed to the completion of the project. He completed the job in the only way it could have been done \* \* \*" (SB 90)

An examination of the nature of Schaefer's own complaints concerning Macris reveals even more clearly that these complaints relate only to matters causing



delay in Schaefer's performance and/or increased cost of performance, not to the imposition upon him of additional or extra work outside of the scope of the subcontract. Schaefer has made a host of complaints of his men wasting many hours waiting until excavations were completed and fine graded by Macris' crew; of excavations not made in proper sequence; of not having lumber on hand; of his carpenters having to shovel now and then in order to place forms; of forms being damaged in removal because of improper excavation. To the same effect are the asserted assurances and urgings of Macris upon which he claims to have relied. Macris, he asserts, promised "to do better" (SB 57); "You're not going to have to wait for anything more \* \* \*" (SB 56); etc.

Under such a fact situation as Schaefer has himself advanced, the authorities cited by him (SB 47-51) have no application. The subcontract required certain things of Schaefer, the performance of which was made more onerous, he asserts, because of a variety of failures on the part of the Macris which delayed him; but it can be fairly said, nevertheless, that his entire performance was for the accomplishment of that which he was contractually bound to do. There is no "extra work" involved in such things as waiting and wasting time while Macris' own crew made corrections, in delays for lack of lumber, when Schaefer supplied not one extra board, in additional time required to place forms in an excavation because banks were not sloped one to one. Such complaints constitute a major portion of Schaefer's asserted loss. On these Schaefer seeks to pyramid an overhead and profit allowance. He may have been

damaged by Macris in the manner asserted but he did not, as elsewhere in his brief he admits (SB 90), perform "any extra work" within the meaning of the cases he has cited (SB 48, 51), in not one of which was there an existing express contract being performed. To reiterate, Schaefer's action, if any, is for such damages as were occasioned to him by the asserted partial breaches of the subcontract.

Adverting again to fundamental concepts of contract law, the only implied agreement which can be correctly said to have existed between Schaefer and Macris, is an implied term of the subcontract relating to the secondary rights of contracting parties. Reference is to the implied promise to pay for such damages as were within the contemplation of the parties and reasonably and necessarily flow from any breach or breaches of the contract. It might be said that there was such an implied promise on the part of Macris just as the same might be said of Schaefer. It will be observed that under this implied term, damages payable are "*actual*" damages (MB 53) and do not include the right to top-off with a generous overhead charge and a handsome profit item, both based upon an arbitrary percentage of total performance costs. Damages are compensatory in contract law, and profits are to be made by the promisee, if at all, out of the agreed contract price. Thus, Schaefer here has no right to recover profit and overhead as an item of damage.

Counsel for Schaefer cannot successfully reconcile the subcontract with an implied in fact agreement, as they attempt to do (SB 52); for, among other reasons, the work done by Schaefer was in the performance

of the subcontract as heretofore discussed, because as Schaefer contends, the "extra work" was necessary in order that he might carry out his own obligations (SB 56) and because the parties did not modify that subcontract (Tr. 2214-15).

The cases of *Western Asphalt Co. v. Valle*, 25 W. (2) 428, 171 P. (2) 159, and *Chandler v. Washington Toll Bridge Authority*, 17 W. (2) 591, 137 P. (2) 97, cited MB 44, and alluded to by Schaefer (SB 54-55), are authoritative in precisely the light in which they were cited; and so are the cases cited by Macris between MB 44-63, particularly the case of *U. S. v. Wyckoff Pipe & C. Co.*, 271 U. S. 263, 46 Sup. Ct. 503, 70 L. Ed. 938, which is stated to be and which is controlling of the instant case. The only reference made by counsel for Schaefer to these cases is "The remaining cases are equally inappropriate and do not merit discussion" (SB 55). The court's attention is respectfully re-directed to the *Wyckoff* case and to the other cases of the United States Supreme Court cited in this portion of Macris' brief (MB 44-63).

It is the gist of Schaefer's contention on page 56 that he performed no extra work, outside the scope of his subcontract, but rather only to carry out his own subcontract. The quintessence of his complaint is delay. Art. III, Sec. 5 of the subcontract reads as follows:

"If the work hereunder shall be delayed by any act, neglect or default of the owner or of the principal contractor, or of any other contractor employed by the Owner or the Principal Contractor upon the entire work, \* \* \* through no fault of the Subcontractor then the time herein fixed for completion of the work shall be ex-

tended for a period equivalent to the time lost by any or all of the reasons aforesaid; provided, however, that no such extension of time shall be made or allowed unless the Subcontractor shall give the Principal Contractor notice, in writing, within five days after the occurrence of any such act, omission or event, specifying the fact and cause of the delay. \* \* \* ”

Under the cases of the U. S. Supreme Court (MB 56), Macris are not under the contract obligated to pay damages to Schaefer because of delay. The cases involving waiver of written provisions with respect to extra work outside the scope of the contract are not apposite. The urgings by Macris to get Schaefer to perform his subcontract do not, properly considered, amount to any waiver by Macris of Art. III, Sec. 5 of the subcontract, nor create any estoppel situation. Schaefer can only say that, under these urgings, he continued the performance of his subcontract. But delayed performance is not a compensable element of damage under the provisions of the subcontract. Otherwise stated, it is conclusively made, by the terms of the subcontract, an item of damages not within the contemplation of the parties at the time the contract was entered into. The rule of *Hadley v. Baxendale*, 9 Ex. 341, is applicable.

#### IV.

There is no dispute with the deference accorded the findings of the District Courts in law actions under Rule 52 (a). The point made by appellants case is unanswerable contrary to the court's finding that Macris breached the subcontract in the manner and extent asserted by Schaefer; that the court's finding is not supported by the substantial evidence in



the case; that the court's finding is contrary to the clear weight of the evidence and induced, apparently, by an erroneous view of the law. *Fleming v. Palmer*, 123 F. (2) 749; *Sbicca-Del Mac Inc. v. Milius Shoe Co.*, 145 F. (2) 389.

## V.

Studied attempt to focus this court's attention on the compilation by Schaefer's accountant Hendershott (Ex. 63) and on the Darcy chart of his ideas of exhausted time (Ex. 51), to the exclusion of considering merits from the testimony of those actually working on the job, permeates subdivision V at SB 61-75.

An example is the statement on SB 61 that "counsel for Macri have not attacked the accuracy" of the Hendershott compilation, "nor have they contended that it does not truly show Schaefer's actual costs and expenses." Our specifications of error No. 3 (MB 29-30) and Nos. 9, 10 and 15 (MB 32-34) refute that; also MB 37-39 Nos. 3 and 7 do likewise; semble, MB 53-54.

Similarly, it is stated at SB 62 that it was "Schaefer's practice to bill on that basis," i. e., cost plus overhead and profit. Schaefer, however, denied that at trial (Br. Con. Cas. 14-15; Tr. 2155). Inconsistently also, it is stated at SB 64: " \* \* \* it is conceded that Schaefer did not keep a separate account of his extra costs."

The Hendershott tabulation from which counsel devise the compilation, at SB 62, and the Darcy chart were pretrial preparations, predicated upon expectation that an oral substitute contract would be sustained by the court. That was not done. The court



found there was no "meeting of the minds" that Schaefer was to be paid the "reasonable value of his costs" (quoted at MB 24 from Tr. 2214-15). The proffered tabulation under subheading 1 at SB 62 therefore falls because of its own lack of foundation.

On the proffered proposition of claimed estoppel asserted at SB 63-74, the one vital point for justification is missed and is wholly absent. It was legally incumbent upon Schaefer to keep his extra costs—under the subcontract terms (Ex. 5, Sec. 3; MB 9) if that subcontract legally controls; or, under oral substitute contract, if that had been held to have been substituted for the subcontract, which it was not (MB 24).

Schaefer, not Macris, failed to keep account of alleged extra costs. Therefore, since it is expressly conceded (SB 64) that "Schaefer did not keep a separate account of his extra costs", he cannot qualify for support of either of the following two U. S. cases quoted at SB 72-74.

The case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 90 L. Ed. 1515, 66 Sup. Ct. 1187, held that the failure of an employer to keep his own accurate accounts and records justified recovery against him by an employee on an estimated basis, because the amount of damages could not be determined with exactness.

The other case of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 90 L. Ed. 652, 66 Sup. Ct. 574, an anti-trust suit on conspiracy to control release of motion pictures, allowed recovery of damages as to one affected plaintiff independent theater by comparison of that plaintiff's earnings before and after

the exertion of the conspiracy. It held the conspiracy was the cause of the plaintiff's inability to compute exact costs and that the plaintiff should not, therefore, be barred from recovery by a defendant having created that disability. But counsel here concedes (SB 64) that "Schaefer did not keep a separate account of his extra costs." Schaefer, not Macri, records were the deficient source for a correct claim.

The claimed tabular demonstration for speedy work at SB 68 lacks record confirmation. It covers a period when the government was insisting that Schaefer quit lagging behind and perform his subcontracted work. Ex. 39, dated September 18, 1944, is a government communication to Macri, with a copy to Schaefer, and Ex. 37, dated January 25, 1945, is a like communication to Schaefer (MB 18). During the period of February and March 1945 the government was invoking penalties at the rate of \$25 per day as liquidated damages for delayed performance (MB 60).

Such proffered tabulation also avoids the following record disclosures: (1) For form setting, an uncontroverted national lumber shortage, despite which over 120,000 bd. feet of lumber were furnished—Schaefer conceded 150,000 bd. feet—with not to exceed 70,000 bd. feet required for forms (MB 70; Tr. 1471, 1418, 1796, 1892); (2) pouring concrete, 665 sacks of cement delivered to Schaefer in April 1944, with an adequate Jaeger mixer available at Portland and with forms set, but no concrete placed until the end of July 1944 (MB 70; Tr. 2143, 1715, 222, 392)—in the Schaefer brief counsel concede Schaefer took his crew, except two laborers, off the job for May through July 1944 (SB 21; MB 15-16)—; and 14.5%

of overrun of concrete (MB 72) which Schaefer's witness Bufton said would indicate unskilled subcontract operations (MB 72; Tr. 1207); and (3) stripping forms, could be no criterion, because until the forms were filled with concrete and cured they could not be stripped from the concrete structures.

Similarly, the proffered percentage table at SB 69, by reference to the Darcy chart (instead of original records) avoids the fact that, by reference to the other proffered percentage tabulation at SB 68, it was speed-up pressured work in a short period of time, after Schaefer had wasted the seasonal construction period from April through July 1944. It is purely an attempt to breath into Bufton's estimate of cost per cubic yard of concrete a job performance justification, which was not in existence. It overlooks two salient and vital features of Bufton's testimony on cross examination: (1) It is always "disastrous" to carry a construction job through the winter (MB 17; Tr. 1176); and (2) Bufton's statement " I certainly would have a shovel on the job while setting forms" (MB 67; Tr. 1218).

The two tabulations at SB 69-71 are mere reiterations of the figures in the Hendershott tabulation, slightly re-arranged by counsel; and, like the compilation at SB 62, also fall, under the law as presented in points 1, 2, 3 and 4 of our opening argument at MB 36-37, for lack of foundation.

We, therefore, respectfully submit, in view of the foregoing and of the inapplicability of either of the U. S. cases above discussed, that the Schaefer brief under its subdivision V (SB 61-75) wholly fails to answer the merits presented in the Macri brief at MB 59-74 and particularly at 60-74.

## VI.

The question of the effect of the Washington statute, *Rem. Rev. Stat.*, Sec. 9980 (MB 59), is squarely before the court. The trial amendment allowed by the trial court and alluded to by counsel (SB 78) fulfills the requirements of Rule 9 (a) of the Rules of Civil Procedure.

## CONCLUSION

In conclusion, cross appellants Macri respectfully submit that the arguments and authorities set forth in the opening brief of these cross appellants have not been answered by appellee Schaefer, that those arguments and authorities establish the judgment of the district court in favor of the use plaintiff, M. C. Schaefer, is opposed to the law applicable to this case, and that the finding of the District Court that Macris had breached the subcontract is clearly erroneous. The judgment of the district court should, therefore, be reversed and the action dismissed.

Respectfully submitted,

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IN THE  
**United States Circuit Court  
of Appeals**  
**FOR THE NINTH CIRCUIT**

CONTINENTAL CASUALTY COMPANY, a  
corporation,

*Defendant and Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, for  
the use of M. C. SCHAEFER, an individual  
doing business as CONCRETE CON-  
STRUCTION COMPANY,

*Plaintiff and Appellee,*

A. J. GOERIG and CLYDE PHILP, indi-  
viduals and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE MACRI,  
individuals and co-partners,

*Defendants and Cross Appellants.*

No. 11707

REPLY BRIEF OF APPELLANT  
CONTINENTAL CASUALTY COMPANY

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

FILED

AUG 19 1948

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The cross appeal of defendants Goerig and Philp herein has been conclusively adjudicated in our favor by this court in *Goerig v. Continental Casualty Co.*, 167 F. 2d 930, decided May 5, 1948, in another appeal arising out of this same job. Precisely the same question was raised by Goerig and Philp in both appeals. Accordingly the judgment should be affirmed upon said cross appeal upon the authority of the said former decision of this court and the authorities therein cited.

The decision of this court upon motion to dismiss Macri appeal herein is in 167 F. 2d 107. As suggested in said decision, Macris have now for the first time objected to the form of the judgment. No such objection was ever made in the district court. Continental now states and makes a matter of record that it has never had and does not now have any objection to its judgment over against the cross appellants being either construed or amended as conditional on the non-payment of the judgment by them. Continental will be very glad to release such judgment immediately if the same be affirmed and if the same be paid by cross appellants.

Replying to page 74 of the Macri brief relative to additional attorneys' fees of Continental on this appeal, this is, of course, a matter of practice and procedure. The substantive right of Continental to attorneys' fees under the indemnity contract is undisputed. The Washington

cases cited by Macris merely refer to "the practice of this court," that is, the state supreme court. However, this is not an action in the state supreme court. Consequently the federal decisions authorizing allowance of additional attorneys' fees on federal appeals govern. This difference in appellate practice was doubtless considered by the district court in allowing such a relatively small sum as Continental's attorneys' fees herein. Whether the substantive right to attorneys' fees is based on statute or contract is wholly immaterial.

With those two exceptions, Continental adopts and relies upon all of the argument and authorities cited in the Macri brief that this action should be dismissed. Of course, it is elementary that if there is no liability of the principal, there is no liability of the surety.

*Fidelity & Deposit Co. v. Duke*, (CCA 9) 293 Fed. 661; *Sarasota v. America Surety Co.*, (CCA 5) 68 F. 2d 543; *National Surety Co. v. Breece*, (CCA 10) 60 F. 2d 847; *General Chemical Co. v. Standard Wholesale T & A Works*, (CCA 4) 101 F. 2d 178; *Phelps v. Dawson*, (CCA 8) 97 F. 2d 339, 116 A.L.R. 1343; 50 *Am. Jur.* 994 §135; *Lidral-Wiley, Inc. v. U. S. Fidelity & Guaranty Co.*, 179 Wash. 631, 38 P. 2d 346; *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661.

#### REPLY TO APPELLEE SCHAEFER'S BRIEF

Appellee Schaefer's brief, as this court will have readily noted, consists almost entirely of a statement of alleged reasons for recovery against the Macris. Very little is

said as to any reason for recovery against Continental—then only as an after-thought in the last few pages of the brief.

Appellee has intentionally ignored and therefore tacitly conceded that in an action under the Miller Act federal rather than state law governs.

Additional authorities so holding are: *U. S. v. Starr*, (CCA 4) 20 F. 2d 803, 805; *Farnsworth Co. v. Electrical Supply Co.*, (CCA 5) 112 F. 2d 150, 154; *Craig v. U. S.*, 69 Fed. Supp. 229; *Francis v. Southern Pac. Co.*, U. S. 92 L. Ed. 610, decided March 15, 1948; *Commissioner v. Tower*, 327 U. S. 280, 287, 90 L. Ed. 670, 676.

In the Starr case Judge Parker said:

“Of course, the rights of the parties in this case are to be determined in the light of the law as declared by the federal courts. . . .

“But in the absence of some such statutory provision, the courts will not read into a bond an obligation which it does not contain.”

In the Farnsworth case Judge Sibley said:

“The rights and liabilities of the parties to a bond given to the United States under the federal statute rests upon the federal law and not the state law, and the implied right to have funds from the contract which are knowingly received by a furnisher of labor or materials applied to these claims rather than to some other debt, is not to be affected by local law.”

In *North Shore Boom Co. v. Nicomen Boom Co.*, 52 Wash. 564, 570, 101 Pac. 148, the court said:

“This question is governed by the United States statutes and the decisions of the United States courts are binding.”

Appellee at pages 75-78 of his brief inconsistently contends that the federal rather than Washington state law governs his right to maintain this action. If the federal law governs in one respect, it governs in all respects.

It must therefore be concluded that it now stands undisputed that the entire fundamental basis of the district court's decision against Continental was admittedly fallacious and erroneous.

Appellee Schaefer's brief directly substantiates our contentions. Throughout the brief appellee repeatedly states and recognizes that his right of recovery, if any, is based directly upon Macris' alleged breach of the subcontract. For example, at page 4 appellee states:

“On the other hand, Schaefer's claim against Macri Company, and the Continental Casualty Company as their surety, is based upon the continuing wilful failure of Macri Company to perform adequately and within a reasonable time the obligations imposed upon it by the subcontract.”

Appellee's contention that he is entitled to recover more than the agreed contract price under the subcontract is based entirely on recovery of damages for Macris' alleged breaches of the subcontract, although ingeniously sugar-coated under the name quantum meruit.

Obviously, however, recovery of additional compensation for such alleged breach of contract constitutes an attempt to recover damages for such breach of contract—by whatever name it may be called.

Manifestly a recovery in excess of the agreed contract price because of Macris' alleged breach constitutes the recovery of damages for breach of contract. This is true in this case especially where it is undisputed that the contract price was the same as the reasonable value of the work if Macri had not breached the contract.

Under the subcontract each party was to do certain things. Admittedly the reasonable value of the things Schaefer was to perform was the contract price. Any recovery in excess thereof is based on damages for breach of contract by Macri in the performance of the things he was to do. But the surety is not legally liable therefor.

Although appellee's brief is not clear, we infer therefrom that he concedes that he cannot recover damages for breach of contract against the surety. That is of course well settled law.

As pointed out at page 22 of our opening brief and in the Macri brief, the district court held that there was no express contract between Macri and Schaefer for the performance of additional work or for the payment of additional compensation. Schaefer has not cross appealed



from the judgment, and therefore cannot urge error in this respect. *Smith v. Boise*, (CCA 9) 104 F. 2d 933, 938; *Cochrane v. M & M Transp. Co.*, (CCA 1) 110 F. 2d 519; *Texas Co. v. Central Fuel Oil Co.* (CCA 8) 194 Fed. 1; *Swager v. Smith*, (CCA 4) 194 Fed. 762.

Therefore, and as pointed out in the Macri briefs, there is no merit to the argument in subdivisions 2 and 3 of the Schaefer brief, and there can be no recovery herein on the theory of an express contract for the payment of additional compensation, because there was none; and there can be no recovery herein upon an implied in fact agreement to pay additional compensation, because it is elementary that such an agreement will never be implied where there is an express contract between the parties, as there was here.

Appellee's argument seems based primarily upon alleged estoppel on the part of Macri. Manifestly even if there were such, there is clearly no estoppel on the part of Continental, and hence there can be no recovery against the latter.

Nor is there any merit, at least as against Continental, in subdivisions 1 and 7 of appellee's brief.

We have examined all of the cases cited and find that none of them are in point. With possibly three exceptions hereinafter referred to, none of them are even cases

arising under the Miller Act. None of them involve a situation such as we have in the instant case. In none of them (with the possible exception of the *Zara*<sup>n</sup> case) did the surety urge a defense of non-liability on the bond under the Miller Act independent from the defenses urged by the principal contractor. In most of them there was not even a surety or bond involved. In none of them did the court permit a recovery against a surety for an amount in excess of the original total agreed contract price. In none of them was there a partial breach of contract and continued performance of the contract on the part of both parties.

The case principally relied upon, *U. S. v. Zara Contracting Co.*, 146 F. 2d 606 (brief p. 27, 80, 84) is clearly distinguishable. There, except for one \$100 item, the subcontract was for the entire job covered by the principal contract. Two months after commencement of the work the principal contractor wrongfully and unjustifiably prevented the subcontractor from completing the work, and the principal contractor finished performance thereof. There was undoubtedly a total rather than partial breach of contract. The subcontractor did not continue performance but ceased and was in fact prevented from further performance. The court merely held that under such circumstances the subcontractor could recover on quantum meruit for such past performance. The amount of re-

covery, however, was substantially less than the total contract price. Everything that was done by the subcontractor was work required by both the subcontract and the principal contract, and consequently the surety was liable. There was no recovery of profit and the recovery was based on plaintiff's "costs." The principal contention of the surety apparently was that it was not liable for rental of equipment. The court also there held at page 609 that the plaintiff's claim for extra compensation in addition to the contract could not be maintained if he were relying upon the express contract. Also there the principal contractor had received additional compensation from the government for the same work performed by the subcontractor.

At page 611 the court said:

*"It is therefore appropriate here . . . to make use of the contract as fixing the basic price."*.. (Citing authorities).

For the foregoing numerous reasons that case is clearly distinguishable, and actually it supports our position rather than that of appellee, as all of the labor there performed was supplied under both the principal contract and the subcontract and was used in the prosecution of said work; and therefore the amount sued for and recovered was *within the contract rather than outside of the contract.*

*McDonald v. Supple*, 96 Or. 486, 190 Pac. 215 (brief p. 28) was not a Miller Act case at all and did not even

involve a surety. It involved an abandonment of a contract by mutual acquiescence of both parties. It is fully distinguished at page 48 of the Macri brief.

*Great Lakes Construction Co. v. Republic Creosoting Co.*, 139 F. 2d 456, (brief p. 29, 80) involved only two issues: (1) whether the action was barred by the one year statute of limitations and (2) whether the breach of the subcontract was on the part of the subcontractor or the principal contractor. It was conceded that the subcontractor had properly partially performed the work under the subcontract and that his work was of the reasonable value recovered in the judgment. The recovery was less than half of the contract price under the subcontract and approximately one-third of one percent of the contract price under the prime contract. The sureties did not appeal separately and raised no question of their liability as distinct from that of the principal contractor. The facts were that the principal contractor wrongfully, greatly delayed the work and prevented performance of the subcontractor in the installation of wooden floors in a new building. In the meantime, costs greatly increased. Thereafter the parties mutually abandoned the contract. The principal contractor purchased materials on hand from the subcontractor and performed part of the work. Thereafter the subcontractor completed the work pursuant to agreement between the parties merely because it could

do so more economically. In affirming the judgment, the court said:

“On the trial it was held that Republic (subcontractor) had been prevented from the performance of his contract without his fault and that Great Lakes (principal contractor) had breached it. . . .

“There was, as properly found by the trial court, an abandonment of the subcontract, and the acceptance of the work and material furnished by Republic upon the understanding detailed in the findings justified and required the recovery upon the quantum meruit which was awarded.”

Manifestly that case has no applicability whatever here.

*Nelson v. Seattle*, 180 Wash. 1, 38 P. 2d 1034 (brief p. 29) did not involve the Miller Act nor even any surety at all. Moreover actually that case supports our position because the court there at page 9 said:

*“Of course, recovery on quantum meruit is permissible only where the work done is not provided for in the contract. Strong & MacDonald v. King County, 147 Wash. 678, 267 Pac. 436. Since the contract provides for the removal of such material, Nelson cannot recover any additional amount on quantum meruit.”*

*In other words, under the authority relied upon by appellee, he cannot recover on quantum meruit as to any work done by him which was provided for in the subcontract.*

On the point referred to by appellee, the facts there



were that the contract obligated the principal contractor to complete his performance in excavating a large hill within one year. Actually he delayed the work so that it took approximately half a year longer. The court merely held that under these special circumstances the subcontractor could recover from the principal contractor (no surety involved) the reasonable value of the work performed during said additional half year period. The case is therefore obviously not at all in point here.

Appellee's contention (brief p. 79) that there is a well settled rule of law that if under the law of contracts a subcontractor has a right of recovery against a principal contractor, he can likewise recover against the surety on a Miller Act bond, is wholly without foundation. No authority is or can be cited which has ever laid down such a rule of law. And of course if that were the law, there would be ample authorities so stating.

Manifestly appellee cannot sustain this contention, as he attempts, merely by citing a few cases where the surety interposed no separate defense but admitted that it was liable if the principal contractor was. That was the situation in each of the cases cited.

For example, in *U. S. v. John A. Johnson Contracting Corp.*, 139 F. 2d 274, (not the case we rely on) the surety did not attempt to interpose a separate defense. The court said:

"The sole question for our determination is whether there is a contractual relationship, express or implied, between Worthington and the contractor."

In other words, the question was whether there was a novation so that a third party, Knecht, was substituted for Johnson as debtor to the plaintiff. Clearly this is not at all in point as authority for establishing liability of a surety.

*Lange v. U. S.*, 120 F. 2d 886, (brief p. 80) affirmed judgment of Judge Coleman of Maryland in *U. S. v. Lange*, 35 F. Supp. 17, who later decided one of the principal cases relied upon by us, *U. S. v. John A. Johnson & Sons*, 65 F. Supp. 514. There is no inconsistency whatever between this earlier decision and his later decision upon which we rely. In the earlier case the surety made no contention that it was not liable if the principal was liable. The sole issue was whether discovery of unforeseen difficulties was sufficient consideration to support a new subcontract. The case does not have the slightest applicability here.

In *U. S. v. Standard Accident Insurance Co.*, 106 F. 2d 200, (brief p. 80), the surety interposed no separate defense. The principal contractor had agreed in writing to pay the subcontractor additional compensation for extra work. The court merely held the agreement valid and binding.

Appellee's statement that the court held in *Royalty Indemnity Co. v. Woodbury Granite Co.*, 101 F. 2d 689, (brief p. 81) that the surety is liable whenever the contractor is liable, is entirely erroneous. (One of the syllabi is misleading). The court did not state any such principle. It merely held that the surety is bound by the contract price in subcontracts, except in case of collusion, fraud or over-reaching, and declined to follow a Washington case to the contrary. *Here appellants* are the ones who are relying upon *the contract price*.

The cases cited by appellee at pages 81 and 82 are clearly distinguishable, as here, as found by the trial court, there was no express contract to pay for extra work, and recovery herein was not on that basis.

*U. S. v. American Surety Co.*, 200 U. S. 197, 50 L. Ed. 437, (brief p. 82, 91) is likewise clearly distinguishable. All that the court there held was that one furnishing labor and materials to a subcontractor for the prosecution of the work under the contract has a valid claim against the surety. Obviously no such issue is presented here.

On the other hand, *U. S. v. John A. Johnson & Sons*, 65 F. Supp. 514, *L. P. Friestedt Co. v. U. S. Fire Proofing Co.*, (CCA 10) 125 F. 2d 1010, and the other cases relied upon by us, are directly in point and cannot be distinguished. Appellee has no alternative but to suggest (brief p. 89, 91) that the courts there "fell into error" and were "mistaken

in their view of the law." We submit, however, that those cases are sound and constitute much more substantial authority than the unsupported opinion of counsel for appellee to the contrary.

Finally appellee desperately contends (brief p. 92) that he is entitled to recover "on the principle of necessity." We are reminded of the famous dictum of the German chancellor in 1914 when Germany invaded Belgium that "necessity knows no law." Certainly we know of no law which would permit appellee to recover against Continental herein solely "on the principle of necessity."

It is well settled in Washington, the law of which appellee has contended governs, and elsewhere that in a suit on quantum meruit the contract price is the maximum limit of recovery. *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548; *Bailey v. Furleigh*, 121 Wash. 207, 208 Pac. 1091; *Davis v. Thurston County*, 119 Wash. 414, 205 Pac. 840; *Dyer v. Pederson*, 112 Wash. 390, 192 Pac. 1002 (197 Pac. 622); *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069; *Rachow v. Philbrick*, 138 Wash. 214, 226, 268 Pac. 876.

Among numerous other authorities to the same effect are: *Hoyle v. Stellwagen*, 28 Ind. App. 681, 63 N. E. 780; *Keyhoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *Oakley v. Duluth Superior Dredging Co.*, 223 Mich. 478, 194 N. W. 123.

In the Oakley case the court said:

“If plaintiff did not breach the contract, and if defendant prevented full performance, plaintiff may sue in assumpsit for the work and labor performed and recover the value thereof, *not exceeding the contract price.*” (Citing authorities).

As stated in *Dickson v. Emmerson*, 154 Ore. 558, 68 P. 2d 439, decided by the same court long after *McDonald v. Supple*:

“The plaintiff . . . is entitled to recover the reasonable value of the work done which inured to the benefit of defendant, *within the limits of the price of the total contract.*”

Regardless of anything that may have occurred and regardless of all that is said in appellee's brief, the fact remains that a subcontract was executed under which the subcontractor agreed to do certain things at a stipulated price. This judgment cannot be affirmed without entirely ignoring the subcontract; and there is certainly no proper basis for disregarding this contract. The fact also remains that under the subcontract the contractor was to do certain things. Continental did not execute a bond guaranteeing that Macri would do anything required of him under the subcontract, except to pay, within the limits of the contract price, for labor and materials that the subcontractor was obligated to and did furnish under the subcontract. The work done by Schaefer other than that required of him under the subcontract was work



which was to be done by Macri thereunder and which Schaefer was at no time obligated to do. At no time prior to the subcontract had Schaefer assumed to do any of the work required under the prime contract except that covered by the subcontract; and Macri had not assumed to let out to Schaefer any other work. The fact remains, according to Schaefer's contention, that Macri was failing to do the work that he had agreed to do and that it was because of this failure that Schaefer did work not required of him under the subcontract.

These facts cannot be changed by anything that has occurred or by any arguments that have been made. No agreement or understanding which the contractor and the subcontractor may have had after these facts came into existence can change them. They stand as an impregnable wall which cannot be ignored. They left the subcontractor in the position where he was not bargaining with the contractor for another subcontract to do some other part of the work required under the prime contract. On the contrary, they left him in the position where it was up to him to either terminate the subcontract because of the contractor's alleged failure to do the work he was required to do under it, or else do this work himself in order that he could go ahead with the subcontract and then *look to Macris* for the damages sustained by reason of his having to do something that he was not required to do under the subcontract.

The subcontractor was not a party to the prime contract and he had no obligations thereunder. Any work that he did under the prime contract was not by reason of any obligation that he had entered into under that contract. He had no obligation to do any work or furnish any labor or material other than that called for by the subcontract. In the absence of such obligation we have the simple question as to why the subcontractor should furnish labor and material other than that called for by the subcontract. The answer is clear and simple. He did so in order to enable himself to proceed with his subcontract, and his right to recover therefor cannot be based on any agreement or understanding he may have had with the contractor about being paid therefor, but is founded on the fact that upon the contractor's alleged failure to do the work or furnish the material he had agreed to do or furnish under the subcontract, the subcontractor had the right, upon electing not to terminate the subcontract, to put himself in the position where he could perform the subcontract and to *hold the contractor* for any damages he might sustain in thus putting himself in this position. These damages did not grow out of or flow from the fact that the subcontractor did certain work or furnished certain labor and material other than that required by the subcontract. While the work he did or the labor and material he furnished may or may not be the measure of the damages, they are not the thing or things that gave rise to or

caused the damages. The damages grew out of the alleged failure of the contractor to do work or furnish labor or material that he had agreed to do or furnish under the subcontract; and the bond does not guarantee that the contractor will do this work or furnish such labor or material or that if he fails to do so and the subcontractor furnishes it that the contractor will pay the subcontractor therefor.

Moreover at pages 64-5 of his brief appellee again concedes that there has been no segregation or record of extra costs. The fact remains that there is no proof from which it can be determined what is the value of the work done by Schaefer which under the subcontract was to be done by Macri or the value of the work performed which under the subcontract was to be done by Schaefer.

It is no excuse for Schaefer to say that he could not or did not keep a record showing what part of the work he did was under the subcontract and what part was not. The burden of proving what work he did that was not called for under the subcontract, as well as its value, is upon appellee, and if he has done it in such a way as to put himself in the position where he cannot prove it, it is his fault, and of course he cannot expect to recover from the bonding company for something he cannot prove. He has not shown what this work was or the value of it and the proof he has submitted not only represents work

that was called for by the subcontract but also work that was not called for on the part of the subcontractor by the subcontract; and there is no way of determining under this proof what part of this work should be valued in accordance with the price fixed by the subcontract or what part of it should be valued on some other basis. It would therefore be impossible in any event for the court to arrive at any definite amount shown by the evidence that would be due Schaefer.

This judgment entered against Continental, far in excess of the agreed contract price, for work alleged to have been done by Schaefer completely outside of the scope of the contract, is clearly erroneous.

Appellee faces this dilemma: If what he did was within the scope of his subcontract, he can not recover more than the contract price therein agreed upon. If on the other hand, what he did was outside of the scope of his contract, the surety is of course not liable therefor.

We therefore submit that the judgment appealed from should be reversed and the action dismissed as to Continental, and that it recover from the cross appellants its reasonable attorneys' fees and costs in both courts.

Respectfully submitted,  
EUGENE D. IVY  
ELWOOD HUTCHESON  
*Attorneys for Appellant*  
*Continental Casualty Company*





No.....~~11707~~...

IN THE

**United States Circuit Court  
of Appeals**

**FOR THE NINTH CIRCUIT**

CONTINENTAL CASUALTY COMPANY, a  
corporation,

*Defendant and Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, for  
the use of M. C. SCHAEFER, an individual  
doing business as CONCRETE CON-  
STRUCTION COMPANY,

*Plaintiff and Appellee,*

No. 11707

A. J. GOERIG and CLYDE PHELP, individ-  
uals and co-partners,

*Defendants and Cross Appellants,*

SAM MACRI, DON MACRI and JOE MACRI,  
individuals and co-partners,

*Defendants and Cross Appellants.*

PETITION FOR REHEARING

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

EUGENE D. IVY  
ELWOOD HUTCHESON  
*Attorneys for Appellant*  
Miller Building  
Yakima, Washington

FILED  
MAR 7 1949

PAUL P. O'BRIEN,



IN THE

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Appellant, Continental Casualty Company, respectfully petitions the above entitled court for a rehearing herein.

The amount involved in this litigation is extremely large; the questions are very important; and the issue has not previously been decided by this court. There are, in fact, only a few cases in which this question has been previously adjudicated by any court. With the utmost respect for the learning and ability of the Chief Judge of this court who wrote the opinion and the concurring Judges, we sincerely believe and respectfully submit that, at least as to appellant, Continental Casualty Company, the opinion is fundamentally erroneous and unsound, and the case, at least as to this appellant, should, we believe, be given further consideration by this court.

The only portion of the opinion dealing with this question of Continental's liability, if any, to Schaefer is subdivision D consisting of only three rather short paragraphs (only two paragraphs aside from statutory quotations) on pages 6 and 7. The decision holding Continental liable for the large sum of \$56,764.97 plus interest and costs is apparently predicated solely and entirely upon the theory that a "*new agreement*" was entered into between the Macris and Schaefer for the performance of extra work of which the reasonable value was said sum. This so-called "the new agreement" is referred to at least twice therein, and two of the principal cases relied upon by us are



thought to be distinguished solely on the ground that in those cases "there was no agreement," etc.

*But here there was no new agreement between the Macris and Schaefer.* The evidence wholly fails to substantiate any such theory or ground of decision. Schaefer alleged it, but failed to prove it. Even the district court expressly held that there was no such new agreement.

As pointed out at page 22 of our opening brief, the district court in his opinion stated:

"In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him, in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. . . .

*"However, the court cannot find under the record here that there was a meeting of the minds, or an express contract that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he*

was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.*" (R. 2213).

Clearly, there could not be any new agreement between the parties unless there was a meeting of the minds thereon. The testimony of Schaefer and his witnesses, as well as that of the Macris and their witnesses, clearly establishes that there was never any new agreement between these parties after the original subcontract was entered into. Schaefer refused specifically to take over the fine grading and the excavating and the other work that was to be done by the Macris. Schaefer admittedly continued to complain throughout the entire job. Obviously, he would not have done so if he had been proceeding in the performance of a new contract which had been agreed upon between the parties.

Of course, as pointed out in the briefs of Continental and the Macris, it is well settled that where there is an express contract between the parties for doing certain work, there can be no recovery therefor on implied or quasi contract. The liabilities of the parties are governed and limited by the express contract they entered into, namely, the original subcontract.

The opinion correctly holds that on the issue of Continental's liability on the payment bond the federal rather

than state law controls because involving the construction of the Miller Act. In so doing, however, this court necessarily is holding to be fundamentally erroneous the entire basis of the district court's decision as to Continental. The district court recognized that under the federal law Continental was not liable but erred in applying its view of the Washington State law. The district court said:

*"Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, United States vs. John A. Johnson and Sons, 65 F. Supp., page 527, if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company. However, it is my view that in these cases, although there is involved the construction of the Federal statute, the Miller Act, that nevertheless, so far as the substantive rights are concerned, that the law of the state is entitled to first consideration."* (R. 2215).

But since this court has now determined, and clearly correctly so, that as to Continental the state law should be disregarded and the federal law controls, we submit that under the federal decisions cited in our opening brief there is here clearly no liability of the surety.

The one reason stated in the opinion for attempting to distinguish those federal decisions is that there there was no agreement of the parties for the performance of additional work and for the payment therefor. *But neither was there any such agreement between these parties in the instant case.* Macri, to be sure, endeavored to make such

an agreement, but the testimony of all of the witnesses on both sides of the case clearly establishes that *no* such agreement was ever entered into *by both parties*.

The opinion quotes the Friestedt case, 125 F. 2d 1010:

*“What was done was not required by any of the terms of the contract, but became necessary because of an alleged breach of the contract because a contractor violated one of the terms of the contract.”*

But we respectfully submit that far from distinguishing the Friestedt case, this shows that the same is directly in point and should be followed here. Most or all of the work for which Schaefer is now attempting to recover, such as excavation work and fine grading, Schaefer was not obligated under any contract, either a new agreement or the original subcontract, to perform. Schaefer's whole case is predicated upon the basis that this was work that Schaefer was not obligated by the contract to do, but that it became necessary for Schaefer to do so because of Macri's alleged breaches of the subcontract. If, as Schaefer contends, the obligation rested upon Macri and not Schaefer to do these things, then clearly they were done by Schaefer not because he was under any contractual obligation to do so but because Macri breached his (Macri's) contractual obligation to do so. We submit that the Friestedt and other authorities cited by us are directly in point and should be followed here.



The only case cited in support of the decision as to Continental is "*Cf. John A. Johnson and Sons v. United States*, 153 F. 2d 534 (Cir. 4)." But that case, we submit, does not in any way support this far reaching decision. That case has never been even cited by Schaefer's able counsel. In that case the contractor and surety appeared together jointly by the same counsel. The surety did not even appear separately and did not urge any separate defense of non-liability under the bond apart from the contractor. There the prime contractor wrongfully (due to error of the government engineer) required the masonry subcontractor to tear down a portion of his completed work and rebuild the same using more expensive brick. It was definitely indicated that the prime contractor would be able to recover over from the government additional compensation therefor. *Every act of the subcontractor in that case was done in performance of his obligations under the original subcontract to construct the masonry and brickwork on the job.* The subcontractor did not perform any work which was the obligation of the prime contractor, as in this case (under the court's findings).

Strange as it may seem, the cited case praises highly, quotes, and affirms the decision of Judge Coleman in *United States v. John A. Johnson and Sons*, 65 F. Supp. 514, 526-532, which is one of the principal authorities relied upon by us herein. Even the district court, Judge Driver, stated,



as hereinabove quoted, that *that decision could not be distinguished, and that, if followed, it would require a dismissal of this action against Continental*. He declined to follow it solely for a reason (that state law controlled) which, as held in this court's decision, was wholly untenable. This court's opinion does not even mention, cite, or attempt to distinguish Judge Coleman's decision upon which we rely. It can not be distinguished. The same was so clearly sound that, although a large sum was involved, the subcontractor, Friedman, did not even appeal therefrom—and did not even cross-appeal therefrom when his opponents appealed from the portion thereof adverse to them.

The situation was that Friedman asserted two claims. Judge Coleman held in his favor as to the first, which was affirmed on appeal (in the case cited by this court) and in favor of the surety upon the second, which was so clearly correct that it was not even appealed from. In other words, even though Judge Coleman's decision was in accord with the decision of the Court of Appeals affirming the same, as to Friedman's first claim, that was entirely consistent with his decision denying recovery against the surety upon Friedman's second claim.

Schaefer's claim here is clearly of the same nature as Friedman's second claim, but entirely different than Friedman's first claim, the only one involved on the appeal.

The decision on appeal, cited by this court, was thus completely distinguished for us in advance by Judge Coleman's decision.

The distinction between the two questions was clearly and irrefutably pointed out by Judge Coleman in the following language:

"We are not unmindful of the fact that, in another part of this proceeding we have allowed this same subcontractor to recover from the general contractor on a counterclaim for extra material and labor he had furnished, on the ground that there was an improper rejection by the general contractor of the material originally supplied. That is to say, we held that the subcontractor was entitled to be paid what this improper rejection had cost him, due to replacing the material with material of higher grade.

"Such counterclaim, it is true, was based upon breach of contract in the sense that the general contractor had not lived up to his part of the agreement in so far as a duty to inspect the material, originally supplied, was imposed upon him in the first instance. However, by the express terms of the last paragraph of Article IV of the subcontract,, which we have previously quoted, the subcontractor and not the general contractor was required to replace the material when ordered so to do by the general contractor, without prejudice to the right given him by the subcontract to have a later determination as to whether or not he should have reimbursement, for any additional expenditures as a result of such replacement. So it will be seen that the performance by the subcontractor, upon which he has based his right of recovery, was *performance such as was expressly required of him by the contract for which, and only for which he could recover under the payment bond which we have heretofore analyzed;*

*whereas, in the present case, there is the distinction that the subcontractor has not supplied labor and materials which he was, in fact, ever required to supply by the terms of the contract. Thus, the subcontractor's present counterclaim is for damages as such, resulting from the general contractor's alleged breach of the contract, although it is true the alleged damages are measured by the cost of labor and materials to the subcontractor which the general contractor, if any one, should have supplied but did not. The distinction is more than a mere technical one. It is a legal distinction required by the very terms of the documents by which the subcontractor is restricted in this limited, statutory proceeding . . . .*

*"The distinction between the two questions is real, not fanciful."*

Referring to the second counterclaim, which was very similar to the Schaefer claim here, upon which recovery against the surety was denied, Judge Coleman said:

*"The substance of the second counterclaim is that the general contractor, although having expressly agreed to provide temporary construction of every nature, necessary to the completion of the work on the project by the subcontractor within the specified time, including the providing of access to the construction site, the general contractor nevertheless failed to provide such access and that, as a result, the progress of the work by the subcontractor was materially interfered with and delayed, thus greatly increasing the cost to the subcontractor, whereby he was damaged in the sum of \$13,740.01. . . .*

*"Coming, then, to the motion to dismiss the other counterclaim of the subcontractor Friedman, the basic question here is whether under the Miller Act a subcontractor may recover damages against a general con-*

tractor and his surety on a claim which is directly predicated on a breach of contract by the general contractor and not on the furnishing of labor and material by a subcontractor pursuant to contract.

"That this is a suit by the subcontractor for such breach of contract by the general contractor seems clear. . . .

"To repeat, we think a distinction must be made between doing work which is of an extra or additional character, or reasonably implied by the terms of the contract as part of the obligation of the subcontractor, and work which, as in the present case not he but the main contractor alone is, by the very terms of the agreement, required to do. The distinction is, in a sense, narrow and technical, but it goes to the very essence of the restricted rights given by this special statute, the Miller Act. We are not unaware of the fact that there are numerous decisions to the effect that a liberal construction must be given to the Miller Act and its predecessor, the Heard Act. . . . But the liberality of construction referred to in those decisions is not meant to go so far as to extend the scope of the Act and to embrace a claim for damages such as the present one. . . .

"Finally, it may reasonably be argued from the dearth of authorities on this precise question, that, in line with the *Friestedt* case, it has been generally conceded that this type of claim was not cognizable under either the Heard Act or the Miller Act. But however that may be, both the weight of such authority as exists, and logical interpretation of the statute, require the conclusion here reached."

Thus we have the unusual situation where the court itself at the time of deciding the two controversies expressly distinguished the one from the other. The cited decision



of the court of appeals is therefore clearly distinguishable, and has, we submit, no applicability here.

No other authority is cited in the opinion as even tending to support this far reaching decision holding the surety liable for this huge sum.

The opinion, as we read it, agrees with our contention that a surety under the Miller Act is not liable for damages for breach of a subcontract by the prime contractor. The opinion, however, declines to apply that well established principle, apparently on the ground that this is not a claim of that nature.

The opinion quotes a portion of one of the district court's findings and then says "it does not appear *from this finding* that the amount of the judgment included damages for breach of contract." (All italics are ours).

We submit, however, that a careful consideration of (1) the findings as a whole, and (2) the opinion of the trial court, and (3) the evidence herein, and each of them, can leave no doubt whatever but that, while under the ingenious form and guise of quantum meruit, the judgment herein was, either in whole or at least in large part, actually for damages for Macri's alleged breaches of the subcontract.

It is true here, as stated on page 5 of the opinion in



referring to *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d 468 (Cir. 9):

*"The nature of the claim, although on the theory of quantum meruit, was really for damages," etc.*

That is precisely the situation here.

The Transbay case is directly in point and conclusive herein.

This has at all times been clearly recognized and conceded by Schaefer and his counsel. For example, at page 4 of appellee's brief he states:

*"On the other hand, Schaefer's claim against Macri Company, and the Continental Casualty Company as their surety, is based upon the continuing wilful failure of Macri Company to perform adequately and within a reasonable time the obligations imposed upon it by the subcontract."*

If the single finding quoted in the opinion were deemed contrary to the proposition that the recovery herein included damages for breach of contract by the Macris, the same would be clearly erroneous, unsupported by the evidence, contrary to the evidence, and therefore clearly reversible error.

Paragraphs 12, 13, and 14 of the district court's findings of fact are as follows:

*"That it was the obligation of the defendant Macri Company to do the excavation in such a way as to afford reasonable clearance and a reasonable oppor-*

tunity for the subcontractor to properly and efficiently carry out its part of the work, and that the clearance reasonably required where a form had to be placed between the concrete and the bank required an excavation of 1 foot out at the base of the excavation from the outside wall of the concrete structure to be installed and a slope of one to one on the bank; that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient width in the excavation to enable the subcontractor to efficiently and properly construct his forms and that he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of the work.

"That the defendants Macri and Company failed to do the fine grading in accordance with the lay-out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work.

"That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work.

"That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality

was not proper and suitable for the work intended; that much of the time there was missing some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind.

*"That the defendant Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was willful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff."* (R. 100-102).

There cannot be any question whatever from this record but that Schaefer's entire case is predicated upon recovery for Macri's alleged breaches of the subcontract.

Appellee's brief at pages 89 and 91 sought to criticize the federal cases upon which we rely upon the ground that the courts there "fell into error" and were "mistaken in their view of the law." They did not even contend that those decisions were sound but distinguishable upon the ground stated in this court's opinion or upon any other ground. We submit that the attempted distinction thereof is untenable and unsound.

This action to recover additional compensation for what

was done by Schaefer because of Macri's alleged breaches of contract is purely and simply an action to recover damages for such breach of contract. Looking through the form to the substance and the realities of the situation, we submit that this is clearly the nature of Schaefer's claim against Continental herein.

Actually Schaefer is attempting to recover on two separate claims:

(1) Compensation for doing what was not included in the concrete work to be done by Schaefer under the subcontract but on the contrary was to be performed by the Macris, and

(2) For additional costs and expenses incurred by Schaefer in performing his own work under the subcontract by reason of delay thereof due to breach of contract by the Macris in not having proper excavation and fine grading timely completed, form labor of suitable quality available, etc.

Neither of these claims is for the full amount of this judgment. Schaefer has made no attempt to state the amount of each or either of the two claims. The judgment is for the total amount of both claims.

We submit that both of these claims constitute damages for breach of contract on the part of the Macris. Neither of them is work required to be done by Schaefer under



the subcontract if properly performed by Macris. Both are outside of the subcontract. Both are for recovery of additional compensation, by whatever name called, arising out of Macri's alleged breaches of the subcontract. (We are assuming herein for the sake of argument, but not admitting, that Macris breached the contract).

In any event, we submit that obviously the first claim herein above mentioned is purely and simply a claim for damages for Macri's breach of contract, as everything done by Schaefer thereunder was something which he was not contractually obligated to do. Could Macris have sued Schaefer if Schaefer did excavation work improperly? Clearly not, because he never entered into any contract to do excavation or fine grading work.

Manifestly, this judgment against Continental cannot be affirmed unless it can be properly held that Schaefer is entitled to recover against Continental on *both* of these two claims. We submit that clearly he is not entitled to do so.

Also, we submit that recovery of additional compensation because in violation of the subcontract Macri rendered Schaefer's work more difficult and expensive, is likewise clearly the recovery of damages for breach of contract. Certainly Schaefer should not be legally entitled to do indirectly what he cannot do directly.



Schaefer under the subcontract agreed to construct the concrete structures for an agreed contract price of \$26.00 per cubic yard of concrete. Appellee's witnesses testified that if Macris had properly performed their contractual obligations, the reasonable value of Schaefer's work would have not exceeded the contract price. Certainly, therefore, the liability of the surety on the statutory bond should not exceed the said agreed contract price. Schaefer's claim is outside of rather than within his contract. It follows that the surety is not liable therefor. Schaefer's claim is directly predicated on Macri's alleged breach of contract and not on Schaefer's furnishing of labor and materials pursuant to his contract.

This is a statutory payment bond to guarantee payment of the agreed contract price (unless unreasonable) owing to laborers, materialmen and subcontractors. It is not a performance bond to guarantee performance of the subcontract by Macris. Congress never required a bond of the latter nature. If as Schaefer contends, he for any reason did work which he was not contractually obligated to do, the surety on the statutory payment bond is not liable therefor.

We therefore respectfully submit that Continental is not legally liable to Schaefer under these circumstances, that the case should be given further consideration, that

the petition for rehearing should be granted, and that the judgment appealed from should be reversed.

The undersigned attorneys for appellant, Continental Casualty Company, herein hereby certify that in their judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Respectfully submitted,

EUGENE D. IVY

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*Attorneys for Appellant*

**In The United States Court of Appeals  
For the Ninth Circuit**

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a corporation,  
*Defendant and Appellant,*

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for the use of M. C. SCHAEFER,  
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*Plaintiff and Appellee,*

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individuals and co-partners,  
*Defendants and Cross Appellants,*

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UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

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**PETITION OF CROSS APPELLANTS MACRI FOR  
REHEARING**

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**In The United States Court of Appeals**  
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individuals and co-partners,  
*Defendants and Cross Appellants.*

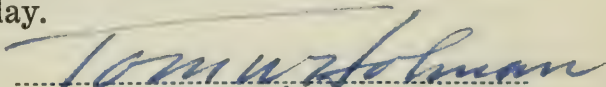
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UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE EASTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

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**CERTIFICATE**

THIS CERTIFIES that the within petition of cross appellants Macri for rehearing is, in the judgment of the undersigned, who is one of counsel for the cross appellants Macri, well founded, and that it is not interposed for delay.

  
-----  
(Tom W. Holman)

---

**PETITION OF CROSS APPELLANTS MACRI FOR  
REHEARING**

The cross appellants Sam Macri, Don Macri and Joe Macri hereby petition the above-entitled court for a rehearing herein.

It is respectfully submitted that between time of argument before this court on October 19, 1948, and time of filing opinion, February 11, 1949, the Honorable Judges of this court have been unintentionally drawn away from the issues as they were presented. The following statement from the filed opinion shows a decided warping:

“The Macris rely on *City and County of San Francisco v. Transbay Construction Co.*, 134 F. (2d) 468 (Cir. 9). \* \* \*”

The fact is that His Honor Judge Healy, near the end of concluding argument by Mr. Holman, for the Macris, asked, in substance, what is to be said about the applicability of the above-mentioned case; that Mr. Holman stated frankly he was unfamiliar with that case, and that none of the parties litigant had cited it in their briefs or in argument to the court; that thereupon His Honor Judge Denman suggested that Mr. Holman read that case and write the court after doing so. That not only was done by Mr. Holman, but all parties litigant wrote the court specifically about that case.

It is, therefore, manifestly unfair to have the filed opinion so state the Macris' position. That statement is not supported by the briefs or by oral argument. In fact, our position is definitely based on *United States v. Wyckoff Pipe & C. Co.*, 271 U.S. 263, 46 Sup. Ct. 503, 70 L. ed. 938, as cited and discussed in the Macris' opening brief, pp. 49-51, 52, App. III,

reply brief pp. 5, 12. The court, notwithstanding this, has not even mentioned that prime case, nor has the court cited and discussed any Washington authorities contrary to the holding of the above *Wyckoff* case.

Further, the filed opinion should not be allowed to stand as presently written for the reason that the same contains a substantial miscalculation in determining the amount of the judgment. The filed opinion holds “\* \* \* the Macris liable for the extra work performed at their request.” (filed opinion p. 6)

Elsewhere the filed opinion states, “Schaefer should be allowed to recover in excess of the stipulated contract price for work performed in reliance on Macris’ statements \* \* \*.” (filed opinion p. 5) The evidence available to the court for the determination of the amount to be allowed for this “extra work” is a statement of costs prepared on behalf of Schaefer by a certified public accountant, which showed all of Schaefer’s costs on the project and the estimates of witnesses for Schaefer that his performance, had it progressed as originally contemplated, would have cost substantially the same as the amount of Schaefer’s subcontract bid price. The amount of the extra compensation was determined by allowing Schaefer therefor the difference between his total cost, including twenty per cent (20%) cost and ten per cent (10%) profit, and the subcontract bid price.

This is error, for the total cost figure included twenty per cent (20%) overhead on all direct costs and ten per cent (10%) profit on all direct costs plus overhead. Schaefer is not, under the filed opinion, entitled to twenty per cent (20%) profit and ten per

cent (10%) overhead on the subcontract price, for such amounts were presumably included by Schaefer in arriving at the amount of his bid, and furthermore, would not have been recoverable in any event had the contract been performed "as originally contemplated." In this latter event Schaefer would have been strictly limited to his bid price. If this honorable court is willing to accept this type of evidence in proof of the amount of the claimed extra work, notwithstanding the authorities cited by the Macris (Macris' opening brief pp. 54, 55), and notwithstanding that it was Schaefer's duty to keep an account of the costs of such extra work, the proper method then for such computation, based upon Schaefer's own statement of costs, is as follows:

(a) Schaefer's total direct costs allowed by the Court (Schaefer op. br. p. 62).....	\$67,712.84	
(b) Subcontract price (Schaefer op. br. 70)	35,274.12	
(c) Total direct cost of extra work.....	32,438.72	
(d) Overhead on extra work—20% of (c)	6,487.74	
(e) Total cost of extra work—(c) plus (d)	38,926.46	
(f) Ten per cent profit on extra work.....	3,892.65	
(g) Total cost, overhead and profit on extra work .....	42,819.11	
(h) Amount remaining unpaid on subcontract price: Subcontract price .....	\$35,274.12	
Amount paid by Macris .....	32,614.66	2,659.46
(i) Total amount <i>properly</i> due Schaefer under the filed opinion of the Court	45,478.57	

The judgment of the trial court should be reduced



to this figure in any event on Schaefer's own figures and without question.

Alluding to the briefs of these appellants and of the appellant Continental Casualty Company and the petition of the latter for rehearing, there can be no question but that the judgment entered by the trial court is a judgment for damages and breach of contract. For this reason it is again submitted that there should be no profit item allowed on the "extra work," more accurately denominated under the authorities "damages" for breach of contract. Damages are compensatory. Schaefer's profit on this job was properly contained in his subcontract bid price. The situation is not changed by saying that his performance was continued in reliance upon statements by Macris, for there was no difference between such statements and the implied obligation existing in every contract to pay damages occasioned by the breach thereof. There should be no arbitrary profit item allowed on the extra work. This fact apparently escaped the consideration of the trial court because of its allowance of recovery for the entire performance on a *quantum meruit* basis rather than limiting such recovery to the extra work only.

The opinion filed by the court holds that the law of the State of Washington is applicable. It is submitted that the court should reconsider, by rehearing herein, the adequacy of Schaefer's proof of the amount of the increased cost of his performance. In this portion of the filed opinion the court states: "There

was evidence to show what Schaefer's costs would have been if the work had progressed as originally contemplated. \* \* \* In the light of this evidence we cannot say that the finding of the trial court was erroneous." Upon this basis the judgment in favor of Schaefer against Macris is affirmed in the filed opinion. There is not a single case cited in support of this conclusion, and it is submitted the evidence is not sufficient under Washington cases.

It will be recalled that Schaefer accepted, without protest or dispute, regular payments as the work progressed, as it was provided in the contract he was to receive. There was no statement of so-called extra costs rendered or payment demanded.

In the case of *Ross v. Raymer*, 132 Wash, Dec. 131, 201 P.(2) 129, decided December 17, 1948, the Washington Supreme Court quotes from a prior decision, *Ammerman v. Old National Bank*, 28 Wn.(2d) 239, 182 P.(2d) 75:

" 'A reading of the cases hereinbefore cited will show that, under the rules announced by this court, the degree of proof required to establish a claim for services under an original contract, be it express or implied, is no different from that necessary to establish a claim for additional and different services. *However, in the latter case, where the one performing the service accepts the payments agreed to under the original contract, there is a presumption that he accepts them in full payment for all services. In both cases mentioned, the proof must be of the clearest and most convincing character.*' " (Italics ours)

So, in the instant case, it would be presumed that payments made to and accepted by Schaefer were in full payment of all work performed by him.

The following Washington cases definitely support Macris' contention that where it was possible for Schaefer to keep the actual costs of the alleged extra work, so that the same would be available to him, estimates of such costs as were given, based upon hypothetical assumptions, do not constitute adequate proof of either damages or costs of work.

*Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 23 P.(2d) 397;

*Automatic Canteen Company of Washington v. Automatic Canteen Company of America*, 182 Wash. 133, 140, 45 P.(2d) 41;

*Hole v. Unity Petroleum Corp.*, 15 Wn.(2d) 416, 131 P.(2d) 150;

*Jones v. Nelson*, 61 Wash. 167, 169, 112 Pac. 88;

*Bell v. Scranton Coal Mines Co.*, 59 Wash. 659, 667, 110 Pac. 628;

*Lloyd v. American Can Co.*, 128 Wash. 298, 313, 222 Pac. 876;

*Bromley v. Heffernan Engine Works*, 108 Wash. 31, 182 Pac. 929.

The judgment of the trial court was based upon the theory that Schaefer was entitled to recover in *quantum meruit* for the entire performance, independent of and divorced from the contract price. Under the filed opinion Schaefer is entitled to recover

only the contract price, plus the cost or reasonable value of his extra work.

Under the above Washington cases and innumerable decisions from other jurisdictions there is no legally adequate evidence upon which to support the judgment of the trial court as a judgment for extra work plus the unpaid balance of the contract price. Two entirely different forms of proof are involved, as indicated by the repeated assertions by counsel for Schaefer to the effect that they had made no attempt and would make no attempt to segregate the extra work items from the contract performance. Contrary to the statement from the filed opinion, quoted above, that is, “\* \* \* we cannot say that the finding of the trial court was erroneous”, the trial court made no finding as to the amount of Schaefer’s increased cost. Consequently there is involved no question as to the deference paid on appeal to the findings of a trial court.

There being such a large amount of money involved, particularly in view of the fact that individuals are the parties litigant, not corporations or governmental agencies, it is earnestly submitted there is no substantial proof of the use plaintiff’s extra costs. This is particularly true in light of the unreasonable and exorbitant relationship between the contract price of Schaefer’s performance, the amount of the judgment awarded in addition to the contract price and the amounts allowable to the cross appellants Macri under the prime contract for the performance of the items claimed by Schaefer as extra work. The very unreasonableness bespeaks the error.



Accordingly, it is respectfully submitted that the petition for rehearing herein should be granted.

S. W. BRETHORST,

TOM W. HOLMAN,

THOMAS N. FOWLER,

WARREN L. DEWAR,

*Attorneys for Cross Appellants  
Macri*





No. 11708

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

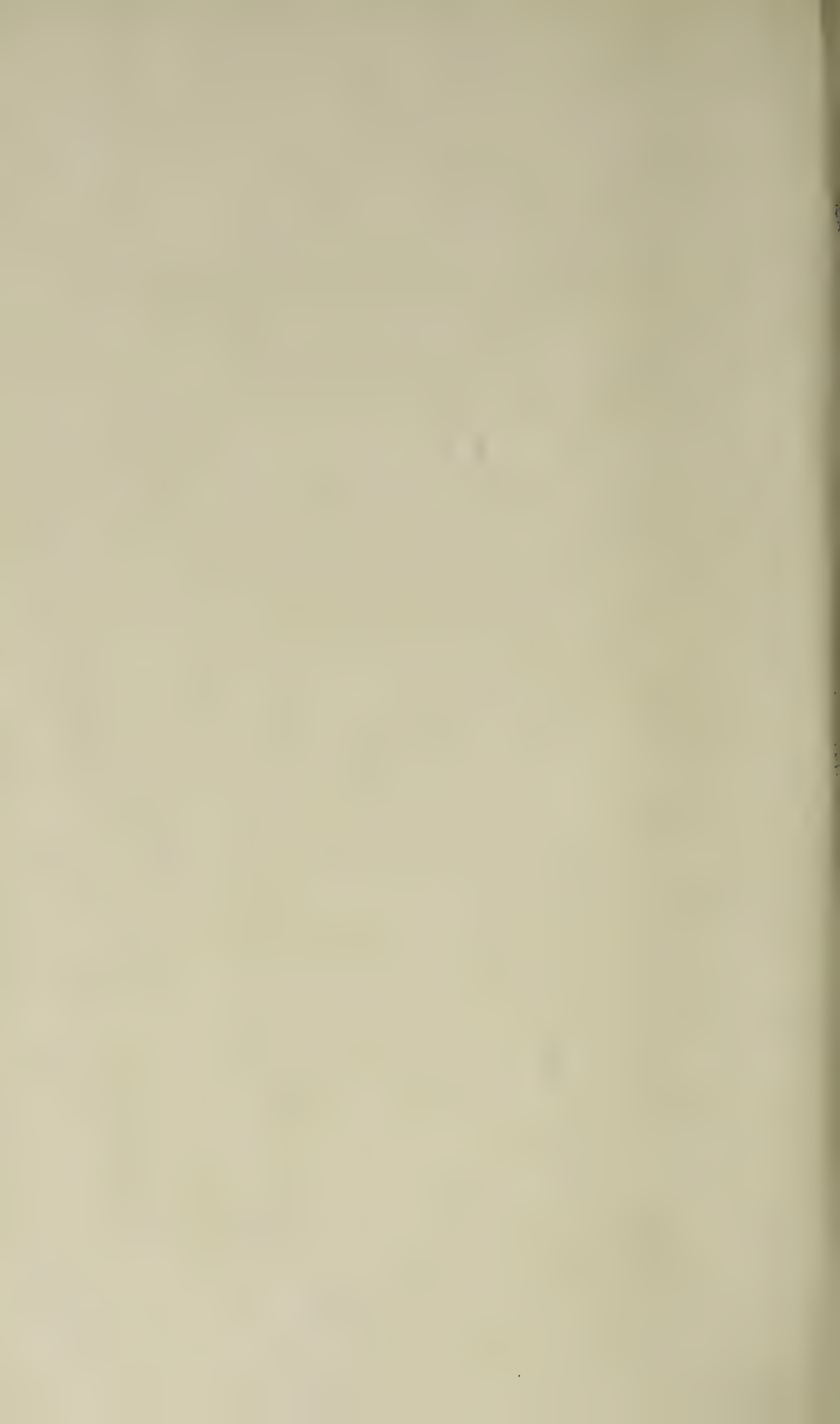
FRANCIS C. BOWDEN, JOHN E. HOEK-  
ZEMA, EDWARD G. BARBER, L. MCGEE,  
CHRIS POULSEN, FRED W. MAYER,  
DR. F. N. (Doc) DORSEY, ROBERT (Bob)  
BAKER and ANTON ANDERSON,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Territory of Alaska,  
Third Division.



No. 11708

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,

vs.

FRANCIS C. BOWDEN, JOHN E. HOEK-  
ZEMA, EDWARD G. BARBER, L. MCGEE,  
CHRIS POULSEN, FRED W. MAYER,  
DR. F. N. (Doc) DORSEY, ROBERT (Bob)  
BAKER and ANTON ANDERSON,  
Appellees.

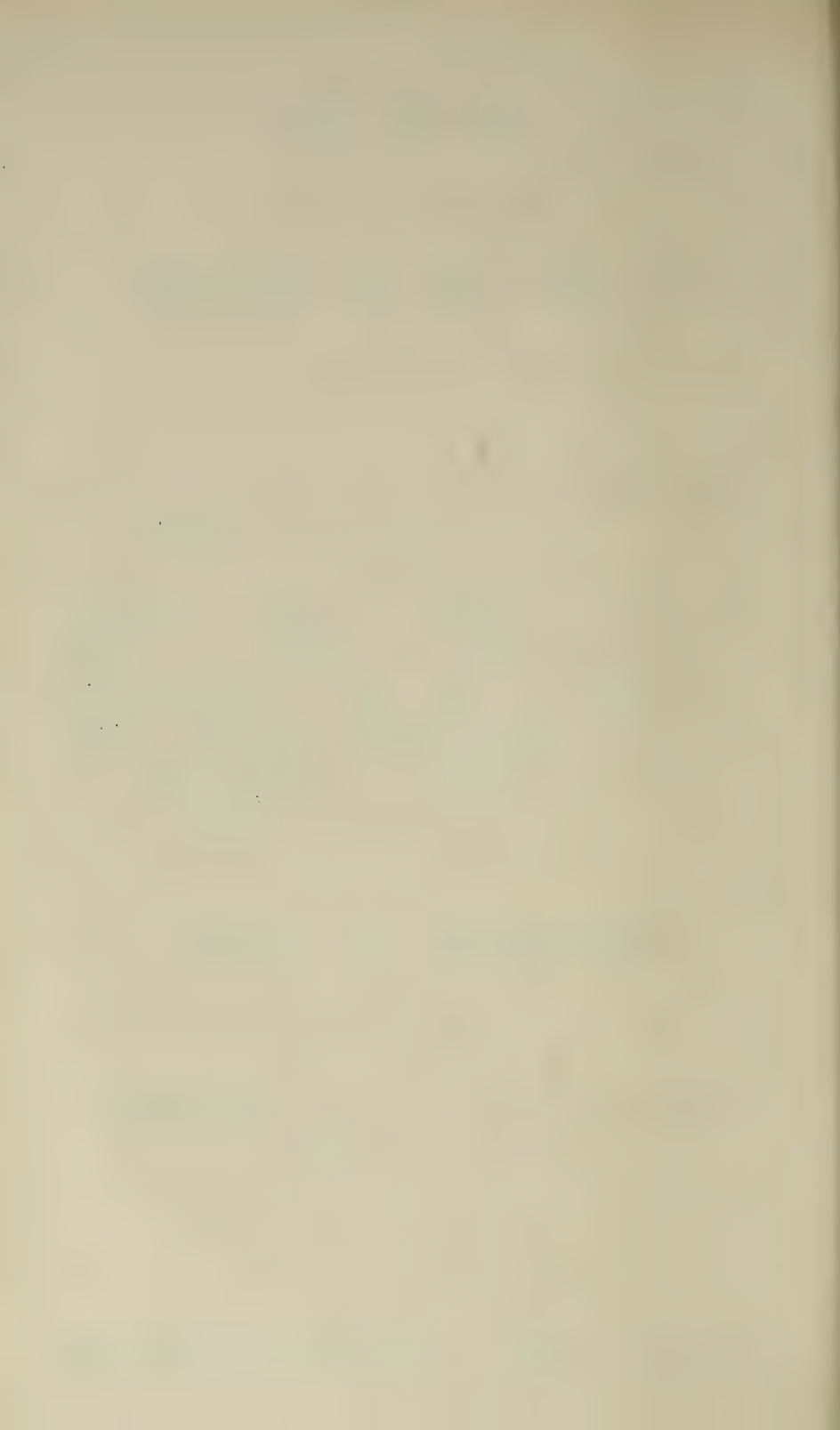
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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Territory of Alaska,  
Third Division.

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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

RAYMOND E. PLUMMER,  
United States Attorney,  
Anchorage, Alaska,  
Attorney for United States of America,  
Plaintiff and Appellant.

HAROLD J. BUTCHER,  
Attorney at Law,  
Anchorage, Alaska,  
Associate Attorney for United States  
of America.

ALMER J. PETERSON,  
Attorney at Law,  
Anchorage, Alaska,  
Associate Attorney for United States  
of America.

E. L. ARNELL,  
Attorney at Law,  
Anchorage, Alaska,  
Attorney for Defendants and  
Appellees.

In the District Court for the Territory of Alaska,  
Third Division

No. A-4492

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA,  
EDWARD G. BARBER, L. McGEE, CHRIS  
POULSEN, FRED W. MAYER, DR. F. N.  
(DOC) DORSEY, ROBERT (BOB) BAKER,  
and ANTON ANDERSON,

Defendants.

### COMPLAINT

Comes now the United States of America, by and through Raymond E. Plummer, United States Attorney for the Third Division of the Territory of Alaska and complains of the above named defendants and for a cause of action alleges:

#### I.

That this case is one of public interest; that there is good reason to believe that a cause of action exists against the above named defendants that can be proven; and that this action is brought in the name of the United States in accordance with and pursuant to the provisions of Chapter 103, Compiled Laws of Alaska 1933.

## II.

That the City known as Anchorage, Alaska, is an incorporated city of the first class, pursuant to the laws of the Territory of Alaska; and is situated in the Third Division, Territory of Alaska.

## III.

That previous to February 23, 1921, and up to the present time, the City of Anchorage, was a duly and regularly incorporated municipality pursuant to the laws of the Territory of Alaska; and as such an incorporated municipality did hold a general election on April 1, 1947 for the purpose of electing a Mayor; three members for a two-year term to the common council; two members for a period of one year to the common council; one member to the public utilities board for a period of three years; one member to the Anchorage Public School Board for a period of one year; and one member for a period of three years to said school board; and accordingly such general municipal election was held within the City limits of said City of Anchorage, on April 1, 1947, polls being open from 8:00 a.m. to 7:00 p.m. in the respective election precincts.

## IV.

That registration of voters was had in connection with said general municipal election in accordance with ordinance No. 51 of the City of Anchorage, entitled "An Ordinance for the Registration of the Legal Electors of the City of Anchorage, in the Territory of Alaska," said ordinance having been



duly and regularly passed and approved by the Common Council of the City of Anchorage on the 17th day of September, 1924.

#### V.

That the City of Anchorage, through its duly authorized and acting officials pursuant to said ordinance No. 51 referred to above, caused a poll book register to be kept open for the registration of all legal voters residing in the City of Anchorage; and that such a book was made available to all legal residents and voters of Anchorage, Alaska, as provided in said ordinance; and that the close of said day of registration was on the 29th day of March, 1947, at 5:00 p.m. at the City Hall of said City of Anchorage.

#### VI.

That as a result of such registration as provided by Ordinance No. 51 of the City of Anchorage, there were 1262 persons who registered for said general municipal election to be held on April 1, 1947.

#### VII.

That on the general municipal election held April 1, 1947, in the City of Anchorage, there were a total of 1738 ballots cast, out of which 1738 ballots cast, there were 653 persons who voted that were not legally registered in accordance with Ordinance No. 51 and who had their ballots sworn in; that therefore there were only 1085 ballots cast by persons who were legally entitled to vote by having complied with the provisions of Ordinance No. 51.

## VIII.

That by reason of the said 653 illegal ballots cast, amounting to approximately 60% of the total number of legal votes cast in said election, that said election and all proceedings in connection therewith are invalid and void.

## IX.

That on the 7th day of April, 1947, at and within the City of Anchorage, and within the jurisdiction of this Court, the defendant Francis C. Bowden, did unlawfully usurp and intrude himself into the said office of Mayor of said City of Anchorage; the defendants John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulson and Fred W. Mayer, did then and there unlawfully usurp and intrude themselves into the said offices of the Common Council of the City of Anchorage; the defendants Dr. F. N. (Doc) Dorsey and Robert (Bob) Baker did then and there unlawfully usurp and intrude themselves into the offices of members of the Anchorage Public School Board; and defendant Anton Anderson did then and there unlawfully usurp and intrude himself into the office of a member of the Utilities Board of the City of Anchorage.

## X.

That each and every of said defendants from then on have continued unlawfully to hold and exercise the said office respectively so as aforesaid usurped by them respectively, the said offices then and there being public offices under and by virtue

of the laws of said City and the Territory of Alaska; the said defendants from the 7th day of April, 1947, to the present time having unlawfully usurped the city government of said city; and that said defendants from the date last aforesaid to the present time, having respectively continued, and still continue, unlawfully to hold and exercise the said offices so as aforesaid respectively unlawfully intruded into by them; and the plaintiff further shows that no other person or persons is or are by law entitled to hold or exercise any of said offices.

Wherefore, the plaintiff prays judgment:

- (1) For an order of this court requiring each and every of the above named defendants to show by what right they claim title to the respective offices now unlawfully usurped, held and exercised by them and further, to show cause, if any there be, why them and each of them should not be ousted forthwith from said respective offices;
- (2) That the said defendants and each of them be ousted from said offices so by them respectively, unlawfully held and occupied;
- (3) That the purported general municipal election of the City of Anchorage held on April 1, 1947 be declared illegal, invalid and void;
- (4) For costs of suit; and,
- (5) For such other and further relief as to the Court seems just and proper.

/s/ RAYMOND E. PLUMMER,  
United States Attorney.

United States of America,  
Territory of Alaska—ss.

Raymond E. Plummer, being first duly sworn upon oath deposes and says: That he is the United States Attorney for the Territory of Alaska, Third Division; that he has read the said complaint and knows the contents thereof and that the same is true as he verily believes.

/s/ RAYMOND E. PLUMMER.

Subscribed and sworn to before me this 8th day of April, 1947.

/s/ GERTRUDE HANSEN,  
Deputy Clerk, District Court.

I hereby certify that the foregoing is a true and correct copy of the original complaint filed in the above entitled court and cause.

/s/ RAYMOND E. PLUMMER,  
United States Attorney.

[Endorsed]: Filed April 8, 1947.

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ORDINANCE No. 51

An Ordinance for the Registration of the Legal Electors of the City of Anchorage, in the Territory of Alaska

Be It Ordained by the Common Council of the City of Anchorage, in the Territory of Alaska:

Section 1. That there shall be a registration of the voters in the City of Anchorage annually prior



to the general municipal election, and no persons shall be entitled to vote at any municipal election who is not registered according to the provisions of this Ordinance: the registration shall be prima facie evidence of the right of any person registered to vote, but said person may be challenged and required to establish a right to vote in the manner provided in Ordinance No. 17, entitled "An Ordinance to Provide for General and Special Elections in the City of Anchorage, Territory of Alaska"; no person shall be registered unless he or she appear in person before the registration officer at the office of such registrar during his usual office hours and apply to be registered, and give his name and particular place of residence, and such place of residence shall be noted in the poll book of the registrar.

#### Book of Registration to Be Opened

Section 2. It shall be the duty of the Common Council of the City of Anchorage, upon the taking effect of this Ordinance, to procure for the registration of voters a poll book register; to open the same for the registration of voters at least sixty (60) days prior to the general municipal election and thirty (30) days prior to any special election, and to appoint a duly qualified elector of the City of Anchorage, who shall be the City Clerk, designated the registrar of the City of Anchorage.

#### Poll Book to Be Kept at Registration Office

Section 3. After such poll book register shall be opened, pursuant to the above section, it shall be



open at all times until the closing of the same for any election, and shall be kept at the office of such registrar; it shall be the duty of such registration officer to register all citizens of the City of Anchorage, who are qualified under the laws of the Territory of Alaska, to vote at any municipal election in said City: before entering upon his duties as registration officer, such registrar shall subscribe to an oath before an officer qualified to administer the same that he will well, truly and accurately register all qualified electors of the City of Anchorage, who apply to him for registration, and no other, and that he will, when the registration book has been closed, deliver the same to the City Clerk, taking his receipt for the same; said registration officer shall have the power to administer all necessary oaths, to examine the applicant for registration, or any witness who may be offered in his behalf, in order to ascertain his right to be registered under the provisions of this ordinance; if the applicant for registration will be entitled to vote at the next ensuing election under the laws of the Territory of Alaska, he will be entitled to registration; otherwise he will not be registered; appeals from the decision of the registration officer may be taken to the Common Council, and from the decision of the Common Council to the District Court for the Territory of Alaska, Third Division; it will be the duty of the registration officer upon the closing of the poll or registration book to certify to the accuracy of such poll list or registration book, before delivering the same to the City Clerk.

## Entry

Section 4. The registration shall be in the following form in said book: Date of registration, name, check line, age, occupation, residence, signature of Elector; the names of the persons registered shall be entered in alphabetical order and an entry shall be made opposite the name of each person to correspond to each of the heads contained in the head of the registration list.

## Certificate of Registration

Section 5. It shall be the duty of the registration officer to give to each citizen registered, according to the provisions of this Ordinance, certificate of registration which shall be substantially in the following form:

United States of America

Territory of Alaska

City of Anchorage .....19....

This is to certify that.....a citizen of the City of Anchorage, has this.....day of.....19.... been duly registered as a voter of the City of Anchorage and is entitled to vote at any election in said City, provided he continues a resident of said City, and provided further, that he is a qualified voter under the laws of the Territory of Alaska, now in force and statutes amendatory thereof.

Witness my hand this.....day of.....19....

-----  
City Registrar

## Registration Officer to Publish Notice

Section 6. It shall be the duty of the registrar of said City, upon notice from the Common Council, to cause to be published in an official newspaper of the City of Anchorage, a notice notifying the citizens of the City of Anchorage, that said registration book is open, and also to publish in like manner a notice ten days prior to the closing of said registration book, stating the date of the closing of said book.

## Registration Book Shall Be Closed

Section 7. The registration book shall be closed on Saturday, at 4:00 p.m. o'clock, prior to any municipal election; and nothing in this Ordinance shall be construed so as to require more than one annual registration of voters.

The poll book of the citizens entitled to vote shall be furnished the election board by the City Clerk.

Section 8. It shall be the duty of the City Clerk to furnish the Judges and Clerks of election with two poll books and two tally lists at least one day before election.

Passed by the Common Council of the City of Anchorage, this 17th day of September, 1924.

/s/ FRED J. SPACH,  
City Clerk.

Approved this 17th day of September, 1924.

/s/ M. J. CONROY,  
Mayor of the City of  
Anchorage, Alaska.

I, Thomas E. Downes, Clerk of the City of Anchorage, Territory of Alaska, do hereby certify that the annexed and foregoing is a true and full copy of the original Ordinance No. 51 now remaining among the records of the said City of Anchorage in my office.

In Witness Whereof I have hereunto subscribed my name and affixed the seal of the aforesaid City of Anchorage, Territory of Alaska, this 11 day of July, 1947.

THOMAS E. DOWNES,  
Clerk, City of Anchorage.

By /s/ THOMAS E. REILLY,  
Acting Clerk, City of  
Anchorage.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, July 18, 1947. M. E. S. Brunelle, Clerk; by /s/ Gertrude Kellner, deputy.

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[Title of District Court and Cause.]

#### ACKNOWLEDGMENT OF SERVICE

I, E. L. Arnell, hereby acknowledge receipt of copies of the Complaint, and Order Setting Time for Hearing on Order to Show Cause, in connection with the above entitled matter, all of which have been certified to by Raymond E. Plummer, United States Attorney to be true and correct copies of the originals now on file herein. I hereby certify that I represent the following named de-

endants and acknowledge receipt of said Complaint and Order on their behalf:

Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, Anton Anderson.

/s/ E. L. ARNELL,

Attorney for the Defendants.

[Endorsed]: Filed April 8, 1947.

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[Title of District Court and Cause.]

ORDER SETTING TIME FOR HEARING ON  
ORDER TO SHOW CAUSE

This matter coming on for hearing on filing of the complaint herein and a motion by the plaintiff seeking the order of this Court setting time for a hearing on an order to show cause against the above named defendants, Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, as prayed for in the prayer of said complaint,

It Is Hereby Ordered That the said Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, be and they are hereby notified to be and appear in the above entitled court at Anchorage, Alaska, on the 15th day of April, 1947, at 10:00 a.m. on said date, then and there to show



by what right they claim title to the respective municipal offices set forth in said complaint and now unlawfully usurped, held and exercised by them; and further, to show cause, if any there be, why they and each of them should not be ousted forthwith from said respective municipal offices now unlawfully usurped, held and exercised by them.

And it is further ordered that the United States Marshal for the Third Division of the Territory of Alaska serve a copy of this order together with a copy of the complaint filed herein upon the said Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, by delivering to each of them copies thereof certified by Raymond E. Plummer, United States Attorney, to be true and correct copies of the originals now on file herein, and of his actions hereunder make return hereon.

Signed in open court in Anchorage, Alaska, this 8th day of April, 1947.

/s/ ANTHONY J. DIMOND,  
District Judge.

I hereby certify that the foregoing is a true and correct copy of the original order for setting time for hearing on order to show cause entered in the above entitled court and cause.

/s/ RAYMOND E. PLUMMER,  
United States Attorney.

[Endorsed]: Filed April 8, 1947.

In the District Court of the United States for the  
Territory of Alaska, Third Division

No. A-4492

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANCIS C. BOWDEN, et al.,

Defendants.

### SUMMONS

The President of the United States of America,  
to the Above-Named Defendant, Greeting:

You Are Hereby Required to appear in the District Court for the Territory of Alaska, Third Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiff, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, judgment will be entered against you ousting you from the respective municipal office now unlawfully held and occupied by you; declaring the purported general municipal election of the City of Anchorage held on April 1, 1947, to be illegal, invalid and void, for costs of suit, and will apply to the Court for the further relief demanded in said complaint.

Witness, the Hon. Anthony J. Dimond Judge of said Court, this 9th day of April in the year of our Lord one thousand nine hundred and forty-seven.

[Seal]

M. E. S. BRUNELLE,  
Clerk.

By /s/ GERTRUDE HANSEN,  
Deputy Clerk.

United States Marshal's Office,  
Territory of Alaska, Third Division.

I Hereby Certify, that I received the within writ on the 9th day of April, 1947, and personally served the same on the 9th day of April, 1947, by delivery to and leaving with Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, said defendants named therein personally, at Anchorage Alaska, in said Division of said Territory, a copy thereof, together with a copy of the complaint, certified to by Raymond E. Plummer, United States Attorney, attached thereto.

Dated at Anchorage, Alaska, the 9th day of April, 1947.

JAMES H. PATTERSON,  
U. S. Marshal.

By /s/ OSCAR OLSON,  
Deputy.

Marshal's Fees: To Service, \$7.00.

[Endorsed]: Filed April 10, 1947.

[Title of District Court and Cause.]

### MOTION TO QUASH

Comes now the above named defendants, individually, by their attorney, E. L. Arnell, and respectfully moves this court for an order quashing the order to show cause issued by this court on the 8th day of April, 1947, against said defendants, upon the ground that Ordinance No. 51, upon which said order is predicated, is unconstitutional and said order is null and void, and upon the further ground that the petition upon which said order is based does not state facts sufficient to constitute a cause of action.

/s/ E. L. ARNELL.

[Endorsed]: Filed April 15, 1947.

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[Title of District Court and Cause.]

### ORAL DECISION GRANTING MOTION TO QUASH

Judge Kehoe: I am going to grant the motion to quash. No motion left to strike, so I need not act on that. You may draw such an order.

Mr. Arnell: Thank you, your Honor.

Mr. Plummer: If the Court please, may I interrogate the Court as to whether on the ground that the statute is unconstitutional?

Court: I think, in my opinion, it is based upon two grounds: First, the lack of power in the City to make such an ordinance on constitutional grounds;

Witness, the Hon. Anthony J. Dimond Judge of said Court, this 9th day of April in the year of our Lord one thousand nine hundred and forty-seven.

[Seal]                      M. E. S. BRUNELLE,  
Clerk.

By /s/ GERTRUDE HANSEN,  
Deputy Clerk.

United States Marshal's Office,  
Territory of Alaska, Third Division.

I Hereby Certify, that I received the within writ on the 9th day of April, 1947, and personally served the same on the 9th day of April, 1947, by delivery to and leaving with Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, said defendants named therein personally, at Anchorage Alaska, in said Division of said Territory, a copy thereof, together with a copy of the complaint, certified to by Raymond E. Plummer, United States Attorney, attached thereto.

Dated at Anchorage, Alaska, the 9th day of April, 1947.

JAMES H. PATTERSON,  
U. S. Marshal.

By /s/ OSCAR OLSON,  
Deputy.

Marshal's Fees: To Service, \$7.00.

[Endorsed]: Filed April 10, 1947.



[Title of District Court and Cause.]

MOTION TO QUASH

Comes now the above named defendants, individually, by their attorney, E. L. Arnell, and respectfully moves this court for an order quashing the order to show cause issued by this court on the 8th day of April, 1947, against said defendants, upon the ground that Ordinance No. 51, upon which said order is predicated, is unconstitutional and said order is null and void, and upon the further ground that the petition upon which said order is based does not state facts sufficient to constitute a cause of action.

/s/ E. L. ARNELL.

[Endorsed]: Filed April 15, 1947.

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[Title of District Court and Cause.]

ORAL DECISION GRANTING MOTION  
TO QUASH

Judge Kehoe: I am going to grant the motion to quash. No motion left to strike, so I need not act on that. You may draw such an order.

Mr. Arnell: Thank you, your Honor.

Mr. Plummer: If the Court please, may I interrogate the Court as to whether on the ground that the statute is unconstitutional?

Court: I think, in my opinion, it is based upon two grounds: First, the lack of power in the City to make such an ordinance on constitutional grounds;

and also I am impressed by the fact that there has been no repeal of Ordinance 17. It is still on the books and is referred to even in the later ordinance showing that the council considered it to be still on the books. Those are the two principal things that make me feel as I do. I decided so quickly because I think it should be decided quickly. It is a very important matter.

Mr. Plummer: That is true.

Court: And nothing will be gained by waiting.

Mr. Plummer: That is right.

[Endorsed]: Filed May 20, 1947.

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#### MINUTE ORDER GRANTING MOTION TO QUASH

Now came the respective parties and the respective counsel as heretofore and the hearing on motion to show cause in cause No. A-4492, entitled United States of America, plaintiff, versus Francis C. Bowden, et al., defendants, was resumed.

Argument to the Court was had by Raymond E. Plummer, United States Attorney, for and in behalf of the Government, re defendants' motion to quash.

Argument to the Court was had by Edward L. Arnell, for and in behalf of the defendants.

Whereupon the Court, having heard the arguments of respective counsel and being fully and duly advised in the premises granted defendants' motion to quash and directed counsel to prepare

and submit written order in accordance with the oral decision given herein.

Entered Court Journal No. G 14, page No. 200,  
April 16, 1947.

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[Title of District Court and Cause.]

### ORDER TO QUASH

This matter having come before the Court on the 15th day of April, 1947, upon defendants' motion for an Order to Quash, the Order for Show Cause issued by this Court on the 8th day of April, 1947, by which Order said defendants were required to be and appear before this Court on the 10th day of April, 1947, to show cause why said defendants should not be ousted from the respective offices to which said defendants had been elected at a general municipal election held on the 1st day of April, 1947, and it appearing from said Motion that the grounds upon which the defendant attacked the validity of said Order to Show Cause were that Ordinance No. 51 was unconstitutional and that the Order of this Court based upon an alleged violation thereof, was null and void and

Further, that the petition of the above named plaintiff did not state facts sufficient to constitute a cause of action and the Court having heard the arguments of E. L. Arnell in support of said Motion to Quash and the arguments of Raymond D.

Plummer, United States District Attorney in opposition to said Motion on the 15th day of April, 1947 and the Court thereupon having continued hearing upon the said Motion until 2:00 p.m. on the 16th day of April 1947, and at such time having heard additional arguments by counsel and the Court thereupon having considered the arguments of the respective counselors and the statutes, ordinances and authorities cited by each, and the Court being fully advised in the premises, now, therefore, it is

Ordered that the Order to Show Cause issued by this Court on the 8th day of April, 1947, be and the same hereby is quashed and annulled, and it is further

Ordered that the defendants be and they are hereby dismissed, and it is further

Ordered that the above entitled proceedings against the said defendants be and the same hereby is dismissed.

Made and ordered entered this 17th day of April, 1947.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed April 17, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the above-entitled Court; and to Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, and their attorney, Edward L. Arnell, Esquire.

Take notice that the plaintiff in the above entitled action hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order to Quash made and entered in said cause on the 17th day of April, 1947, by the District Court for the Territory of Alaska, Third Division, dismissing said cause in favor of the defendants and against the plaintiff, and from the whole of said Order to Quash so entered.

Dated this 15th day of July, 1947.

/s/ RAYMOND E. PLUMMER,  
United States Attorney, Anchorage, Alaska,  
Attorney for Plaintiff-Appellant.

Service of the copy of the above and foregoing Notice of Appeal is hereby acknowledged this 15th day of July, 1947.

/s/ E. L. ARNELL.

[Endorsed]: Filed July 15, 1947.



[Title of District Court and Cause.]

### PETITION FOR APPEAL

Comes now the plaintiff, the United States of America, by Raymond E. Plummer, United States Attorney for the Third Division, Territory of Alaska, and feeling itself aggrieved by that certain final Order to Quash entered in the above entitled cause on the 17th day of April, 1947, wherein said cause was dismissed, prays an appeal therefrom, and from the whole of said order, to the United States Circuit Court of Appeals for the Ninth Circuit, the particulars wherein it considers said final order to quash to be erroneous are set forth in the assignment of errors which is filed herewith and to which reference is hereby made.

Wherefore, the premises considered, your petitioner prays that an appeal in its behalf, to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of and herewith duly assigned, be allowed and granted, and that a transcript of the records, papers and documents upon which said final order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and petitioner prays a reversal of said final order.

Dated at Anchorage, Alaska, this 15th day of July, 1947.

/s/ RAYMOND E. PLUMMER,

United States Attorney, Anchorage, Alaska,  
Attorney for Plaintiff-Appellant.

Service of copy of the above and foregoing Petition for Appeal is hereby acknowledged this 15th day of July, 1947.

/s/ E. L. ARNELL,  
Attorney for Defendants.

[Endorsed]: Filed July 15, 1947.

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[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes now the plaintiff, the United States of America, by Raymond E. Plummer, United States Attorney for the Third Division, Territory of Alaska, and in connection with its petition for appeal files the following assignment of errors on which it will rely on its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final Order to Quash entered in the above entitled Court and cause on the 17th day of April, 1947, dismissing said cause:

#### I.

The Court erred in dismissing said cause for the reason that said dismissal was contrary to law.

#### II.

The Court erred in making and ordering entered its Order to Quash on the 17th day of April, 1947, dismissing said cause for the reason that the same is contrary to law.

## III.

The Court erred in ordering that the Order to Show Cause issued on the 8th day of April, 1947, be quashed and annulled for the reason that the same is contrary to law.

## IV.

The Court erred in dismissing the defendants for the reason that the same is contrary to law.

## V.

The Court erred in dismissing the proceedings for the reason that the same is contrary to law.

/s/ RAYMOND E. PLUMMER,  
United States Attorney, Anchorage, Alaska,  
Attorney for Plaintiff-Appellant.

Service of copy of the above and foregoing Assignment of Errors is hereby acknowledged this 15th day of July, 1947.

/s/ E. L. ARNELL,  
Attorney for Defendants.

[Endorsed]: Filed July 15, 1947.

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[Title of District Court and Cause.]

## ORDER ALLOWING APPEAL

On this day came the United States of America, the plaintiff in the above entitled cause, and presented its Petition for Appeal and an Assignment of Errors accompanying the same, which petition,

upon consideration by the Court, is hereby allowed.

And, It Is Hereby Ordered by the Court that the appeal prayed for be, and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the final Order to Quash, and the whole thereof, made and entered in the above entitled Court and cause on the 17th day of April, 1947, dismissing said cause.

Done by the Court and ordered entered at Anchorage, Alaska, this 15th day of July, 1947.

/s/ ANTHONY J. DIMOND,  
District Judge.

Service of copy of the above and foregoing Order Allowing Appeal is hereby acknowledged this 15th day of July, 1947.

/s/ E. L. ARNELL,  
Attorneys for Defendants.

[Endorsed]: Filed July 16, 1947.

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[Title of District Court and Cause.]

#### CITATION ON APPEAL

To the Defendants: Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker, and Anton Anderson, and to their attorney, Edward L. Arnell, Esquire:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, California, in said circuit, within forty (40) days from the date hereof, pursuant to an order allowing an appeal duly entered in the Clerk's Office in the District Court for the Territory of Alaska, Third Division, at Anchorage, Alaska, in that certain action wherein the United States of America is plaintiff and you are defendants, as above entitled, and wherein the said United States of America is appellant, to show cause, if any there be why the final order to quash, and the whole thereof, entered on the 17th day of April, 1947, ordering that said cause be dismissed, should not be reversed and corrected and why a speedy justice should not be done to appellant, the said United States of America.

Witness, the Honorable Anthony J. Dimond, Judge of the District Court for the Territory of Alaska, Third Division, and the seal of said Court hereunto affixed this 15th day of July, 1947.

/s/ ANTHONY J. DIMOND,

Judge of the District Court,  
Territory of Alaska.

Attest:

/s/ LOUISE ANNABEL,

Deputy Clerk of said Court.



Service of copy of the above and foregoing Citation of Appeal is hereby acknowledged this 15th day of July, 1947.

/s/ E. L. ARNELL,  
Attorney for Defendants.

[Endorsed]: Filed July 16, 1947.

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[Title of District Court and Cause.]

### PRAECIPE

To the Clerk of the District Court, Territory of Alaska, Third Division:

You will please make, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a true copy of all of the following indicated portions of the record in the above entitled cause, as the transcript to be used on the appeal of the plaintiff, The United States of America, from the final order to quash dismissing said cause, made and entered in said cause on the 17th day of April, 1947, to wit:

1. Complaint.
2. Ordinance No. 51. An Ordinance for the Registration of the Legal Electors of the City of Anchorage, in the Territory of Alaska.
3. Acknowledgment of Service.
4. Order Setting Time for Hearing on Order to Show Cause.

5. Summons.
6. Motion to Quash.
7. Transcript of oral decision of Honorable Joseph W. Kehoe granting motion to quash.
8. Minute Order granting motion to quash.
9. Order to Quash.
10. Notice of Appeal.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Allowing Appeal.
14. Citation of Appeal.
15. This Praecipe.

Dated at Anchorage, Alaska, this 23rd day of July, 1947.

/s/ RAYMOND E. PLUMMER,  
United States Attorney, Anchorage, Alaska,  
Attorney for Plaintiff-Appellant.

Service acknowledged by receipt of a copy of the above and foregoing Praecipe this 23rd day of July, 1947.

/s/ E. L. ARNELL,  
Attorney for Defendants.

[Endorsed]: Filed July 23, 1947.

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### ORDINANCE No. 17

An Ordinance to Provide for General and Special Elections in the City of Anchorage, Territory of Alaska

Be it Ordained by the Common Council of the City of Anchorage:

Sec. 1. There shall be a general municipal election held in the City of Anchorage, Territory of Alaska, annually on the first Tuesday of April of each year; said election shall begin at 8 o'clock a.m. and continue without interruption until 7 o'clock, p.m. of the same day.

Sec. 2. Special elections may be called and held at any time to fill vacancies in the Common Council or School Board; provided that not less than ten days notice of the time and place of holding same, and the officer or officers to be elected, be given by the City Clerk of the City of Anchorage, and that such election be held in accordance with the provisions of ordinance and the laws governing elections. Every officer elected at a special election to fill a vacancy in the Common Council or the School Board shall hold office for the unexpired term of his or her predecessor, and until his or her successor is elected and qualified.

Sec. 3. There shall be elected at the next regular election of the City of Anchorage, a Common Council consisting of seven councilmen, each for the term of one year; there shall also be elected at each annual election thereafter one member of the School Board of Anchorage School District, as follows: in 1921 a director for the term of three years; in 1922 a Clerk for the term of three years; at the election in 1923 a Treasurer for the term of three years, and the same for each succeeding election

thereafter; all members of the school board elected at an annual election for a full term shall hold office for three years, and until his successor is elected and qualified, unless sooner removed as provided by law or ordinance.

Sec. 4. The qualifications of a voter for councilman or member of the School Board shall be as follows: Such voter shall be a citizen of the United States, over the age of twenty-one years, who has resided continuously one year next preceding the election in the Territory of Alaska, and six months next preceding the election in the limits of the City of Anchorage. All persons possessing the qualifications of voters are eligible to hold office in the Common Council or the School Board.

Sec. 5. It shall be the duty of the City Clerk at least twenty days before any general election and ten days before any special election to cause to be published at least once in a newspaper of general circulation, published at Anchorage, Alaska, or to post in at least three conspicuous public places in said city, a notice of such election, which notice shall state the time and place of holding such election, the hour of opening and closing the polls, the qualifications of voters at such election, and the offices to be filled at such election.

Sec. 6. It shall be the duty of the Common Council at their regular meeting before any general municipal election, annually, to appoint for said general election three judges who shall be qualified voters of the City of Anchorage, Alaska,

and who shall constitute a board of judges for such election, and in like manner to appoint a like board of judges for any special election. The Council shall, at the same time, appoint two suitable persons, possessing the qualifications of electors, to act as clerks of election. If any judge or clerk of election so appointed shall fail or refuse to serve or attend at the time and place appointed, the voters present shall elect another judge or clerk who is a qualified voter, to serve in his place.

Sec. 7. Before entering upon the discharge of their duties, said judges and clerks shall each take and subscribe to the following oath:

“I....., do solemnly swear (or affirm) that I will honestly and faithfully perform the duties of judge (or Clerk) of election according to law; that I will assiduously endeavor to prevent, fraud, deceit or abuse in conducting the election, to the best of my ability, So Help Me God.”

Said Oath may be administered by an officer authorized by law to administer oaths in the Territory of Alaska, and the oaths so administered shall be filed with the City Clerk. Any member of the election board may administer and certify oaths required to be administered during the holding of the election.

Sec. 8. Thirty minutes before the closing of the polls on the day of election one of the judges shall proclaim the time remaining before the polls shall close, and when the polls are closed the fact must



be announced aloud, and after such proclamation no ballots shall be received. Before receiving any ballots the election board must in the presence of any persons assembled at the polling place, open and exhibit to those present and close the ballot boxes, and thereafter they must not be removed from the polling place or presence of the bystanders until all ballots are counted, nor must they be opened again until the polls are finally closed.

Sec. 9. That in all elections to be hereafter held in the City of Anchorage, Alaska, the printing and distributing of ballots and instructions to voters shall be paid for by said City.

Sec. 10. Nomination of candidates for any office to be voted for shall be by petition for each candidate, signed by not less than twenty legal qualified voters of the City. Such petition shall be plainly written, and shall state the name of the candidate and the office for which he is nominated. Such petitions shall be filed in the office of the City Clerk at least ten days before the day of election. Any objection to the sufficiency of a petition shall be determined by the Common Council at once upon the same being made, and upon notice to the candidate and the objector or objectors.

Sec. 11. The names of all candidates to be voted for shall be printed on one ballot, including both candidates for the Common Council and the School Board. Preceding the list of candidates for each office there shall be placed the words: "Vote for not more than seven" or "Vote for not more than one"

or such other number as are to be elected to the office in question, as the case may be.

Sec. 12. On the back of outside of the ballot, so as to be clearly visible when folded, shall be printed the words "Official Ballot," date of the election, and a facsimile of *the* Clerk who has caused them to be printed. The ballots shall be of plain white paper, through which printing or writing cannot be read. The names of Candidates shall be printed in capital letters, not less than one-eighth of an inch or more than one-fourth of an inch in height, and at the beginning of each line in which the name of a candidate is printed, a square shall be printed, the sides of which shall not be less than one-fourth of an inch in length.

Sec. 13. For all elections to which this ordinance applies the City Clerk shall have charge of the printing of the ballots for all general and special elections and shall furnish them to the judges of election. Ballots shall be printed and in the possession of the officer charged with distribution of same at least one day before election and subject to the inspection of candidates and their agents; if any mistake be discovered they shall be rectified without delay. The officer charged with the printing shall deliver to the judges of election not less than twelve hours before the opening of the polls, sufficient ballots for use in the election. Such ballots shall be placed in separate sealed packages with marks on the outside, clearly designating the number of ballots enclosed, and a receipt

therefor taken from the judges of election to whom they are delivered, which receipt shall be preserved in the records of the City.

Sec. 14. The City Clerk shall publish full instructions for the guidance of voters as to how to obtain the ballots, as to the manner of marking them and the method of obtaining information, and as to procuring new ballots in place of any destroyed or spoiled, and he shall cause same to be printed in large clear type on instruction cards, and said Clerk shall furnish to the judges of election a sufficient number of such cards of instruction to enable the judges of election to comply with the provisions of this ordinance.

Sec. 15. The City Clerk shall also have printed a number of specimen ballots on colored paper, and delivered same to the judges of election in order to enable judges to comply with the provisions of this ordinance and the election laws.

Sec. 16. The judges of election shall have charge of the official ballots and furnish them to the voters as hereinafter set forth.

Sec. 17. It shall be the duty of the City Clerk to cause to be erected in the polling place or places designated by the Common Council, a sufficient number of booths, which shall be supplied with such supplies and conveniences, **including shelves, pens, pen-holders, blotters and pencils** as will enable the voter to mark his ballot for voting and in which the voter may prepare his ballot screened from observation. The ballot boxes shall be within plain

view of the election officers and voters and persons within the polling place, outside of the booths. Each of said booths shall have three sides enclosed, and the side in front to be enclosed with a curtain. The expense of providing booths, and other things required to be furnished by this ordinance shall be paid in the same manner as other election expenses.

Sec. 18. Any person desiring to vote shall give his name to the judges of election, and his residence if required, and sign the poll book. One of the judges shall give the voter one and only one ballot, on the back of which the judge in charge shall indorse his initials in such a manner that they may be seen when the ballot is properly folded, and the voter's name shall be noted on the poll books. If any person desiring to vote shall be challenged he shall not receive a ballot until he shall have established his right to vote in the manner provided by law; and if he be challenged after he has received his ballot he shall not be allowed to vote until he shall have established his right to do so in the same manner.

Sec. 19. Upon receipt of the ballot the voter shall forthwith retire alone to the voting booth provided, and shall prepare his or her ballot, by marking in the appropriate margin or place opposite the name of the candidate of his or her choice; providing, however, that such voter shall not vote for more than the proper number of candidates for each office to be elected thereto. Before leaving



the voting booth the voter shall fold his ballot in such a manner as to conceal the marks thereon. He shall then hand the same to one of the judges of election who shall examine the initials, and if found correct shall deposit in the ballot box.

He shall mark his ballot without undue delay. No person shall take any ballots from the polling places before the closing of the polls. Any voter who shall through accident or mistake mutilate or spoil the ballot given him, shall upon returning same to the judges receive another in place thereof. Any voter who shall swear upon oath, to be administered by one of the judges of election, that he cannot read the English language, or that by reason of a physical disability he is unable to mark his ballot, shall upon request be assisted in marking same by two of the election judges, to be agreed upon between the judges themselves; such judges nor either of them shall not divulge any information derived from so doing. The judges of election shall cause to be entered upon the poll list after the name of a voter receiving assistance, a memorandum of such fact. Intoxication shall not be regarded as a physical disability, and no intoxicated person shall receive assistance in marking his ballot.

Sec. 20. If the voter shall mark more names than there are persons to be elected to any office, or if for any reason it is impossible to tell the voter's choice for any office to be filled, the ballot shall not be counted, for such office. No ballot without the official endorsement thereon shall be



permitted to be deposited in the ballot box, and none but ballots complying with the provisions of this ordinance shall be counted. Ballots not counted shall be marked "Defective" on the back thereof, and ballots to which objection has been made shall be marked "Objected to" on the back thereof, and signed by the judges, stating why the ballot was not counted, and all defective ballots shall be enclosed in an envelope and so marked as to distinguish the contents. All ballots not voted, and all ballots spoiled by voters shall be returned by the judges of election to the City Clerk, and receipt taken therefor and same shall be kept for six months; such clerk shall keep a record of the number of ballots delivered at the various polling places, the names of persons to whom delivered, the time when delivered, and he shall also enter upon such record the number and character of the ballots returned, with the time when, and by whom returned.

Sec. 21. No ballot shall be rejected for the reason that purpose of same is obscure, either as to the person voted for or the designation of office if the judge can determine from an inspection of the ballot as to the person intended to be voted for, and the office designated.

Sec. 22. The Common Council shall, at least twenty days before any annual municipal election and at least ten days before any special election designate by resolution the place for holding such election.

Sec. 23. It shall be the duty of the members of the election board, or any voter present to challenge any person offering to vote when he shall know or suspect not to be qualified to vote. If a person offering to vote is challenged as not qualified, the judges of election, or one of them, shall require the person so challenged to make the following affidavit, which shall be sworn to on oath before one of said judges; any one of whom shall be and he is hereby empowered to administer the oath therefor:

“I ..... do solemnly swear (or affirm) that I am qualified and entitled to vote at this Municipal Election. in the City of Anchorage, Alaska, held this ..... day of April, 19.... That I am over the age of twenty-one years, to wit of the age of ..... years. That I am a citizen of the United States. That I have resided continuously for one year next preceding this ..... day of April, 19.... in the Territory of Alaska, and for six months next preceding said date in the City of Anchorage, Territory of Alaska.”

-----  
 Subscribed and sworn to before me this  
 ..... day of April, 19....  
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If the voter signs and takes oath of the foregoing statement he shall vote, otherwise he shall be rejected.

Sec. 36. As soon as the polls are finally closed the judges shall open the ballot boxes containing the vote cast, and when the same have been counted and result ascertained the same shall be checked with the poll list, and all ballots replaced to be counted again as hereinafter provided for. In no case shall a ballot box be removed from the room in which any election shall be held, until all the ballots have been finally counted. The counting of ballots shall in all cases be public. The ballots, after having been counted and checked as herein provided, shall be taken out carefully, one by one by the judges of election, who shall open them, and read aloud the name of each person voted for, provided that no more ballots be drawn from the box than shall tally exactly with the poll list.

Sec. 37. The judges shall write down each office to be filled and the name of each person to be voted for for such office, and they shall keep the number of votes by tallies as they are read aloud. The counting of votes shall be counted without interruption or adjournment until all are counted.

Sec. 38. It shall be the duty of one of the judges to string the ballots at the time of the counting, and after all the ballots have been counted and strung, it shall be the duty of the judges to place them in a sealed envelope, and to write thereon:

“Ballots of Municipal Election of the City of Anchorage, held this ..... day of April, 19....”

and to deliver said sealed envelope to the City Clerk, who shall keep the same unopened for one year, to be used only as evidence in case of contest when called for; at the end of which time it shall be the duty of the Common Council of the City of Anchorage to burn said ballots in the presence of two other city officials as witnesses, thereto, and make and keep a memorandum in writing of these facts.

Sec. 39. As soon as all the votes are read off and counted, a certificate shall be drawn upon each of the papers containing the poll lists and tallies, or attached thereto stating the number of votes each person voted for has received, and designating the office for which he was voted. Said certificate shall be signed by the judges of election, and the same, with the poll lists, tallies or tally papers, oaths of judges and oaths of voters and other papers, shall be sealed in an envelope by the judges and endorsed "Election Returns" and be delivered to the City Clerk.

Sec. 40. The Common Council shall meet at their usual place of meeting on the first Wednesday after each election to canvass the returns; they must proceed then and there to canvass said returns, but may for good cause postpone such canvass from day to day, not exceeding three postponements. The canvass must be made in public, and by opening the returns and estimating the vote for each person voted for, and for and against each proposition voted for at such election, and declare the result thereof.



The City Clerk must, as soon as the result is declared, enter upon the records of the Common Council a statement of such results, which statement must show:

1. The whole number of votes cast in the City.
2. The names of the persons voted for and the propositions voted upon.
3. The office to fill which each person was voted for.
4. The number of votes given to each of such persons and for and against each of such propositions.

The Common Council shall declare elected the seven persons, or such number as were to be elected, having the highest number of votes given for common councilmen, and also such person or persons having the highest number of votes cast for the respective offices of Director, Clerk or Treasurer of the School Board, as the case may be.

The City Clerk must immediately make out and deliver to such persons on demand, a certificate of election, signed by him and by the President of the Common Council, and authenticated by the Corporate Seal of the City.

Sec. 41. All officers elected under the ordinances of the City of Anchorage, before entering upon the duties of office, must take and subscribe the following oath or affirmation:



“I.....do solemnly swear (or affirm) that I will support the constitution of the United States, and the laws, and the ordinances of the City of Anchorage, Territory of Alaska, and that I will faithfully and honestly perform the duties of the office of.....So Help Me God.”

Sec. 42. In the event that any member of the Common Council shall for a period of ninety days continuously fail or neglect to attend the meeting of the council without having been granted leave by the council, and said council may declare a vacancy of the office held by said person and the same shall be filled by appointment by the Common Council. The person chosen to fill such vacancy holding said office until his successor is elected at the next annual election and has qualified. Provided, that a vacancy may also be created by the written resignation of any member and duly accepted by the Council; and provided further, that a vacancy shall also be declared if a member thereof shall die or if a person elected a member of the Common Council fail or refuse to qualify within thirty days after his election.

Sec. 43. No person whatsoever shall do any electioneering on election day within the polling place or within 100 feet of the same; no person shall interfere with, interrupt, hinder or oppose any voter, while approaching the polling place for the purpose of voting. Whoever shall violate the provisions of this section shall be deemed guilty of a misdemeanor and shall be punished by a fine of not

more than \$100.00 or imprisoned in the City Jail not more than ninety days, or both, in the discretion of the Court. It shall be the duty of the judges of election to enforce the provisions of this section.

Sec. 44. Any person who shall make false statements as to his inability to mark his ballot, or any person who shall interfere or attempt to interfere with any voter when marking his ballot, or any person who endeavors to show any voter how he marks or has marked his ballot shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than \$100.00 or by imprisonment in the City Jail not more than ninety days, or both, in the discretion of the Court. It shall be the duty of the election judges to enforce the provisions of this section.

Sec. 45. Any person who shall, prior to election, wilfully destroy or spoil or tear down any list posted in accordance with the provisions of this ordinance, and who, during election, shall wilfully tear down the cards of instruction or specimen ballot posted for the instruction of voters or shall during the election wilfully destroy any of the supplies or conveniences furnished to enable voters to prepare ballots, or who wilfully hinder or obstruct or interfere with the voting of others, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding \$100.00, or by imprisonment in the City

Jail not more than ninety days, or both, in the discretion of the Court.

Sec. 46. Any person who shall take from the polling place any official ballot or substitute for them or any of them any spurious ballot or ballots, or make, use, circulate or cause to be made, used or circulated for any such ballots any paper printed in imitation or resemblance thereof, or shall wilfully destroy, deface or spoil any ballot, or who shall wilfully interfere with or delay the delivery of any ballot, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding \$100.00 or by imprisonment in the City Jail not exceeding ninety days, or both, in the discretion of the Court.

Sec. 47. Any public or election officer, upon a duty is imposed by this ordinance, who shall wilfully neglect to perform, or who shall wilfully perform such duty in a way as to hinder or obstruct the object and purpose of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding \$100.00 or by imprisonment in the City Jail not exceeding ninety days or both, in the discretion of the Court.

Sec. 48. The Municipal Magistrate shall have jurisdiction of all violations of the provisions of this ordinance. This ordinance shall take effect and be in force from and after the date of its passage and approval.

Passed and approved by the Common Council of the City of Anchorage, Alaska, this 23rd day of February, 1921.

[Corporate Seal]

/s/ LEOPOLD DAVID,

President of the Council and  
Ex-officio Mayor.

Attest:

M. J. CONROY,  
Clerk.

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### CERTIFICATE

United States of America,  
Territory of Alaska—ss.

I, the undersigned, Acting City Clerk of the City of Anchorage, do hereby certify that the foregoing copy of Ordinance No. 17 is a true, full, and correct copy of the original of such Ordinance, the original of which is now on file in the City of Anchorage Code of Ordinances; and that by law I am authorized to make this certification.

In Witness Whereof I have hereunto set my hand and the official seal of the City of Anchorage, this 5th day of August, 1947.

/s/ THOMAS E. REILLY,  
Acting City Clerk.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, August 6, 1947. M. E. S. Brunelle, Clerk; by /s/ Julia W. Whitaker, Deputy.

[Title of District Court and Cause.]

DEFENDANTS' PRAECIPE

To the Clerk of the District Court, Territory of  
Alaska, Third Division:

— You will please make, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in addition to the items listed in Plaintiff's Praecipe, a true copy of the following indicated portions of the record in the above entitled cause, as the transcript to be used on appeal, to wit:

1. Ordinance No. 17 of the City of Anchorage.  
An Ordinance providing for General and Special Elections in the City of Anchorage, Territory of Alaska.
2. This Praecipe.

Dated at Anchorage the 28th day of July, 1947.

/s/ E. L. ARNELL,  
Attorney for Defendants.

Service acknowledged by receipt of a copy of the above and foregoing Praecipe this 28th day of July, 1947.

/s/ RAYMOND E. PLUMMER,  
United States Attorney.

[Endorsed]: Filed July 28, 1947.



CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD

United States of America,  
Territory of Alaska, Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 42 pages, numbered from 1 to 42, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipies filed in my office on the 23rd day of July, 1947 and on the 28th day of July, 1947; that the foregoing transcript has been prepared, examined and certified by me, and that the costs thereof, amounting to \$6.75 have been paid by E. L. Arnell, counsel for the appellees herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court this 14th day of August, 1947.

M. E. S. BRUNELLE,  
Clerk.

By /s/ IOLA FOWLER,  
Chief Deputy.

[Endorsed]: No. 11708. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Francis C. Bowden, John E. Hoekzema, Edward G. Barber, L. McGee, Chris Poulsen, Fred W. Mayer, Dr. F. N. (Doc) Dorsey, Robert (Bob) Baker and Anton Anderson, Appellees. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed August 16, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

---

In the United States Circuit Court of Appeals  
for the Ninth Circuit  
No. 11708

UNITED STATES OF AMERICA,  
Appellant,  
vs.

FRANCIS C. BOWDEN, et al.,  
Appellees.

NOTICE OF POINTS TO BE RELIED UPON,  
UPON THE APPEAL, AND DESIGNA-  
TION OF PARTS OF THE RECORD TO  
BE PRINTED

To the Clerk of the United States Circuit Court  
of Appeals, for the Ninth Circuit:

The appellant in the above entitled action intends

to rely upon his appeal upon the points designated in the assignments of error appearing in the transcript of record, and hereby adopts such assignments of error.

The appellant in the above entitled action desires the entire record contained in the certified transcript of record prepared by the Clerk of the District Court, Third Division, Territory of Alaska, to be printed in its entirety.

Dated: At Anchorage, Alaska, this 2nd day of September, 1947.

/s/ RAYMOND E. PLUMMER,

United States Attorney,

Attorney for Plaintiff-Appellant.

Service acknowledged and admitted by receipt of a copy this 2nd day of September, 1947.

/s/ E. L. ARNELL,

Attorney for Appellees.

[Endorsed]: Filed Sept. 4, 1947.



No. 11708

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**UNITED STATES OF AMERICA, APPELLANT**

*v.*

**FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, EDWARD G.  
BARBER, L. MCGEE, CHRIS POULSON, FRED MAYER,  
• DR. F. N. (DOC) DORSEY, ROBERT (BOB) BAKER, AND  
ANTON ANDERSON, APPELLEES**

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**ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY  
OF ALASKA, THIRD DIVISION**

---

**BRIEF FOR APPELLANT**

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**RAYMOND E. PLUMMER,**  
*United States Attorney,  
Attorney for Appellant.*

---

**FILED**

**DEC 2 1917**

**PAUL P. CORDEN,**  
**CLERK**





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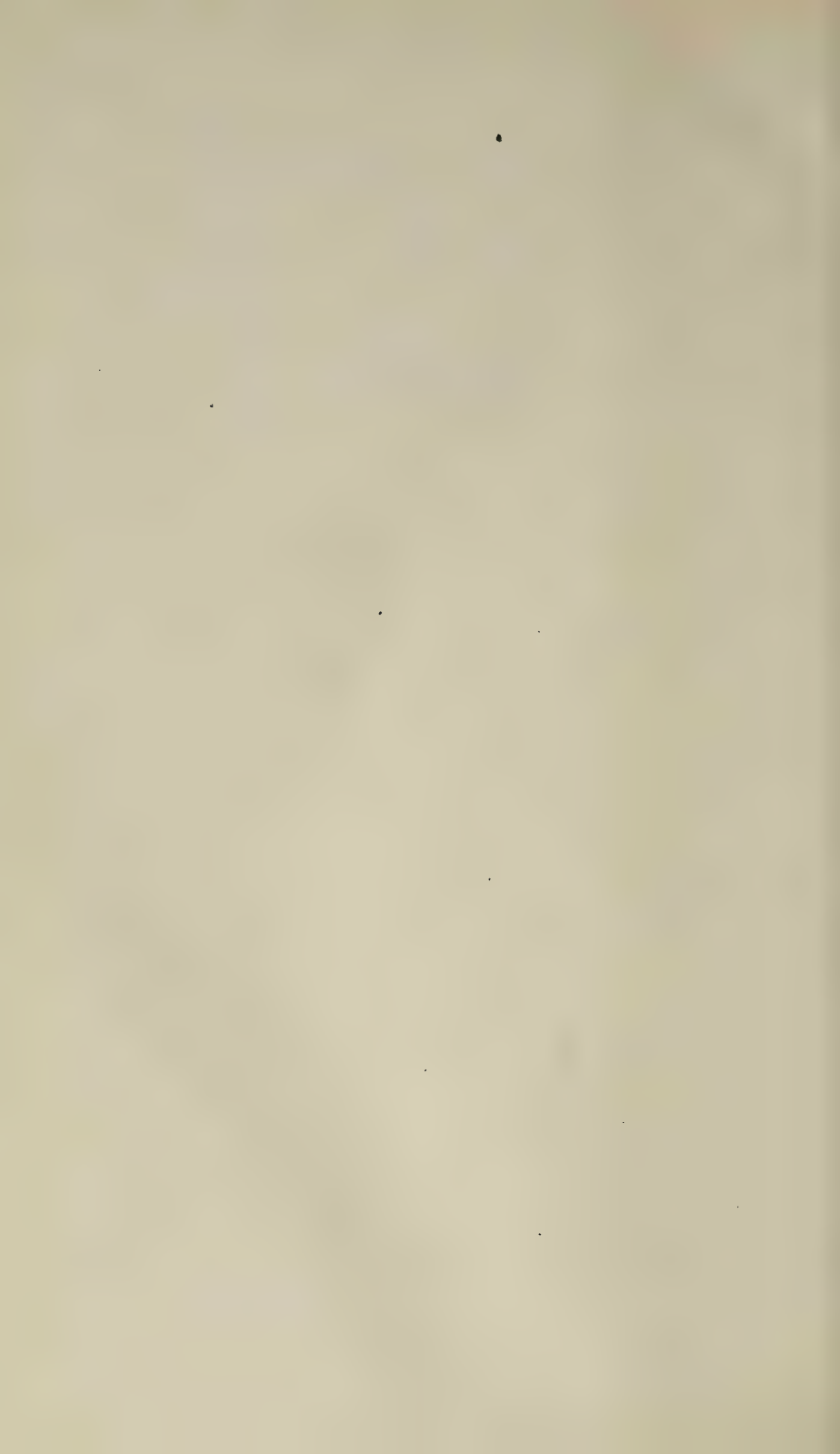
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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

No. 11708

---

UNITED STATES OF AMERICA, APPELLANT

*v.*

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, EDWARD G.  
BARBER, L. MCGEE, CHRIS POULSON, FRED MAYER,  
DR. F. N. (DOC) DORSEY, ROBERT (BOB) BAKER, AND  
ANTON ANDERSON, APPELLEES

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*ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY  
OF ALASKA, THIRD DIVISION*

---

## **BRIEF FOR APPELLANT**

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### **JURISDICTION**

This is an appeal taken from an order filed and entered in the District Court for the Third Division, Territory of Alaska, on the 17th day of April, 1947. This order quashed an order to show cause previously made by the Court, dismissed the defendants and dismissed the proceedings against the defendants (R. 19-20).

The District Court had jurisdiction in this proceeding by virtue of the provisions of Chapter 103, Compiled Laws of Alaska, 1933, entitled "Actions to Avoid

Charters and to Prevent the Usurpation of Office or Franchise and to Determine the Right Thereto'' and by virtue of Section 4 of the Act of June 6, 1900, c. 786, 31 Stat. 322, as amended (48 U. S. C. A. 101).

A complaint was filed in the District Court and an order to show cause was issued on the 8th day of April, 1947 (R. 2-7 and 13-14). On the 15th day of April, 1947, defendants, through their attorney, filed a motion to quash the order to show cause (R. 17). On that same date a hearing was had on said motion. An order granting the motion to quash, dismissing the defendants and dismissing the proceedings against the defendants was filed and entered by the Court on the 17th day of April, 1947 (R. 19-20).

On the 15th day of July, 1947, appellant filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit and an order allowing said appeal was duly and regularly signed and entered on the 16th day of July, 1947 (R. 21 and 24-25). The Ninth Circuit Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 128 (a) and (d) of the Judicial Code, as amended (28 U. S. C. A. 225 (a) and (d)). The appeal is governed by Section 8 (c) of the Act of February 13, 1925, as amended (28 U. S. C. A. 230), which requires that application for allowance of appeal be duly made within three months after the entry of the judgment of the District Court.

## STATUTORY PROVISIONS INVOLVED

The Act of March 3, 1927, c. 363, Sections 1, 3, 44 Stat. 1392 (48 U. S. C. A. 51), provides in part as follows:

From and after March 3, 1927, no person shall become or be an elector or voter at any general election, any special election, or any primary election, held in the Territory of Alaska for the purpose of electing or nominating any person or persons to or for the office of Delegate to the House of Representatives of the United States from the Territory of Alaska, or to or for the office of Senator or member of the house of representatives of the Alaska Territorial legislature, or to or for any other elective, Territorial, municipal, or school office in the Territory of Alaska, unless such proposed voter or elector at the time of any such election and prior to voting thereat shall be able to read in the English language the Constitution of the United States and to write in the English language: *Provided*, That the requirements of this section shall not apply to any person who is incapacitated from complying therewith by physical disability only: *And provided further*, That this section shall not apply to any citizen who has legally voted at the general election of November 4, 1924.

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SEC. 3. The ability to so read and write as provided by section 51 of this title shall be

evidenced as follows: Every person, except as otherwise provided in said section 51, desiring to vote at any such election, before being permitted to vote, shall, without the aid or assistance of any person whomsoever, legibly sign his or her own full name, and write his or her own sex and address, in the registration or poll book, \* \* \*.

The Act of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), provides:

All citizens of the United States, twenty-one years of age and over, who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, and who are able to read and write the English language as prescribed and provided by Section 51 of this title, and who are not barred from voting by any other provision of law, shall be qualified to vote at any of the elections mentioned in said Section 51.

Ordinance No. 51, of the City of Anchorage, entitled "An Ordinance for the Registration of the Legal Electors of the City of Anchorage, in the Territory of Alaska", approved May 17, 1924, is set forth in the record (R. 7-12). Ordinance No. 51 was amended in 1931 by Ordinance No. 80 to the extent that the registration books would remain open until 5:00 p. m. on the Saturday next prior to any municipal election instead of 4:00 p. m. on such date.

**STATEMENT OF THE CASE**

Pursuant to the provisions of Ordinance No. 17 (R. 28-45) of the City of Anchorage, a general municipal election was held April 1, 1947, that date being the first Tuesday of the month, for the purpose of electing a mayor, three members for a two year term to the common council, two members for a period of one year to the common council, one member to the Anchorage Public School Board for a period of one year, one member for a period of three years to said School Board, and one member to the Utilities Board for a three year term.

Prior to the election held on April 1, 1947, proper notice was published as to the date and hour of the opening and closing of the registration book and the poll book register was kept open for the registration of all legal voters residing in the City of Anchorage in compliance with the provisions of Ordinance No. 51. During the registration period provided by said Ordinance No. 51, which ended at the hour of 5:00 p. m. on Saturday, March 29, 1947, a total of 1,262 persons registered for said general municipal election.

The returns of the municipal election showed that a total of 1,738 ballots were cast. Out of this number, 653 ballots were cast by persons who had not registered in accordance with the provisions of Ordinance No. 51, and therefore the actual number of legal ballots cast at said election was 1,085.



The tabulated results of the election were as follows:

*Mayor (One Year):*

Francis C. Bowden—837.  
Edward V. Davis—767.  
Ferdinand P. Lefort—61.  
Etienne Fredericks—58.

*Council (Two Years):*

John E. Hoekzema—980.  
Edward G. Barber—777.  
L. McGee—506.  
William H. (Bill) Olson—505.  
C. E. Franson—451.  
Olaf A. Olson—426.  
Moritz Andresen—421.  
Harry W. Olsen—321.  
Harold Boyd—314.  
Harvey Goodale—102.  
Kitchel Cleaver—99.

*Council (One Year):*

Chris Poulsen—548.  
Fred W. Mayer—528.  
C. O. Risch—511.  
Dr. L. J. Seeley—509.  
Harry Suggitt—468.  
L. W. (Tex) Noey—314.  
Nicholas J. Rauch—197.  
Philmore Bailey—136.

*School Board (Three Years):*

Dr. F. N. (Doc) Dorsey—892.  
Charles L. Griffith—759.

*School Board (One Year):*

Robert (Bob) Baker—900.  
Harold M. Reherd—639.

*Utilities Board (Three Years):*

Anton Anderson—1046.

George R. Jones—602.

On April 8, 1947, after the candidates receiving the majority of ballots, including both legal and illegal votes, had been issued certificates of election and had been sworn and seated, a complaint in the nature of a quo warranto proceeding was filed by plaintiff (R. 2-7), praying that defendants be ordered to appear and show by what right they claimed title to the respective offices held by them and to show cause why they should not be ousted from said offices. This information was not filed on the relation of a private person but was brought in the name of the United States of America in accordance with the provisions of Chapter 103, C. L. A. 1933 (R. 2).

On the same date an order was issued by the District Court requiring the defendants to appear on the 15th day of April, 1947, to show by what right they claimed title to the respective municipal offices held by them and to show cause why they should not be ousted from said offices (R. 13-14).

On April 15, 1947, defendants filed a motion to quash the order to show cause issued by the Court on April 8, 1947, for the reason that Ordinance No. 51, upon which said order was predicated, was unconstitutional and therefore the said order was null and void, and upon the further ground that the petition upon which said order was based did not state facts sufficient to constitute a cause of action (R. 17). A hearing on defendants' motion to quash was held on

April 15 and 16, 1947. Counsel for defendants contended that Ordinance No. 51 established an additional qualification for voters at a general municipal election in the City of Anchorage; that said ordinance was inconsistent with the provisions of the Act of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), and was therefore unconstitutional. On April 16, 1947, the court granted defendants' motion to quash and directed counsel for defendants to prepare and submit a written order in accordance with the oral decision then given. At the time the oral order of the Court was made an oral opinion was also rendered by the Court (R. 17-18).

On April 17, 1947, a formal written order was entered by the Court quashing the order to show cause issued by the Court on the 8th day of April 1947, ordering the defendants dismissed, and ordering that the proceedings against the said defendants be dismissed, the ground of said order being that Ordinance No. 51 was unconstitutional (R. 19-20). From this order appellant appeals (R. 21).

It is to be particularly noted that the proceeding in the District Court was not in the nature of an election contest. There is no provision under the laws of Alaska or ordinances of the City of Anchorage for the contest of a municipal election. The proceeding is in its nature an ouster proceeding in the form of quo warranto, and was brought under Chapter 103, C. L. A. 1933, entitled "Actions to Avoid Charters and to Prevent the Usurpation of an Office or Franchise and to Determine the Right Thereto." In view of the provisions of Chapter 103, C. L. A. 1933, the Alaska

courts have held that since the statutes of Alaska provide a plain, speedy, and adequate remedy at law for testing title to an office, equity will not assume to do so on a collateral attack (*Monahan, et al. v. Lynch, et al.*, 2 Alaska Reports 132, 134).

The case before this Court, therefore, presents the single question as to whether Ordinance No. 51 is inconsistent with the provisions of the Act of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), and is, for that reason, unconstitutional.

#### **SPECIFICATIONS OF ERRORS**

1. The District Court erred in holding that Ordinance No. 51 was unconstitutional.

2. The District Court erred in quashing and annulling the order to show cause issued on April 8, 1947, in ordering defendants dismissed, and in ordering the proceedings against the defendants dismissed.

#### **ARGUMENT**

##### **Specification of error I**

The District Court erred in holding that Ordinance No. 51 was unconstitutional.

##### **Specification of error II**

The District Court erred in quashing and annulling the order to show cause issued on April 8, 1947, in ordering the defendants dismissed, and in ordering the proceedings against the defendants dismissed.

The argument on these two specifications of error is presented together inasmuch as they both involve the same point, i. e., the constitutionality of Ordinance No. 51.



In McQuillin, *Municipal Corporations*, 2d Ed., Vol. 2, Section 427, p. 11, et seq., we find the following statement:

If the constitution prescribes the qualifications of electors, state and local, such qualifications of course cannot be diminished, enlarged or in any way changed by statute, charter or ordinance, but in the absence of constitutional restriction, federal or state, the legislature's power respecting elections is unlimited, and it may prescribe or change the qualifications of municipal voters. Where the qualifications of electors or persons authorized to vote at municipal elections are prescribed by the state constitution and laws, such provisions are controlling in the conduct of municipal and other elections unless the particular state constitution vests such power in the local electors, and the local corporation cannot by charter, ordinance or otherwise depart from the method laid down. But if the provisions do not conflict with the general law of the state the municipal corporation is frequently permitted to prescribe by charter or ordinance the qualifications of voters voting at municipal elections, and *to provide for their registration*. [Italics supplied.]

*Republican Town Committee, Narragansett v. Knowles*, 198 Atlantic 780.

*McMahon v. Mayor, etc., of Savannah*, 66 Ga. 217, 42 Am. Rep. 275.

In *McMahon v. Mayor, etc., of Savannah, supra*, the constitution prescribed the qualifications of voters and also provided that the general assembly might enact



laws for the registration of all voters. The Act challenged in that case, among other things, provided that the City Clerk of the City of Savannah should open a list for the registration of voters, that such list should be open from the 1st Monday in July until the 1st Monday in December, till 2:00 p. m., that upon being registered a certificate was to be issued to the voter and upon production of the certificate of registration at the polls the voter was entitled to vote, but not otherwise. It was contended that the law was manifestly inconsistent with the Constitution of Georgia, that it prescribed qualifications for electors not authorized by the constitution, and that it would disfranchise voters under the constitution and deprive them of their right to vote. The lower court in sustaining the validity of the statute stated:

On the hearing upon the rule to show cause why an injunction should not issue this day had, it being the opinion of the court that the city registration law is valid and constitutional and still of force, upon this ground alone, and without passing upon the affidavits submitted, it is considered and ordered by the court that the injunction be, and the same is hereby denied and refused.

On appeal the judgment of the court below was affirmed.

Section 9 of the Organic Act of Alaska (Act of August 24, 1912, c. 387, Sec. 9, 37 Stat. 512, 514-515, 48 U. S. C. A. 77) provides in part as follows:

The legislative power of the Territory of Alaska shall extend to all rightful subjects of

legislation not inconsistent with the Constitution and laws of the United States, \* \* \*.

Subsection 3 of Section 4 of the Act of April 28, 1904, c. 1788, 33 Stat. 531-537, pertaining to cities of the first class in the Territory of Alaska, provides in part as follows:

SEC. 4. That the said common council shall have and exercise the following powers:

\* \* \* \* \*

*Third:* To make suitable provisions for municipal and other elections, and to appoint three judges and two clerks of election for each polling place in the town.

This provision is embodied in Subsection three of Section 627 of the Compiled Laws of Alaska, 1913. It appears in the Compiled Laws of Alaska, 1933, as Section 2383.

Congress, by this provision, has expressly granted to the common council of the City of Anchorage the power to make suitable provisions for municipal elections. This must be construed as granting to the council the right to provide for municipal elections, and as an incident to such right the power to regulate and control such elections. While it may seem at first glance that this is an effort to stretch the power granted by Congress, it cannot logically be contended that since Congress granted the power to make suitable provisions for municipal elections to the council, stopped there and did not itself provide the necessary rules and regulations to govern such municipal elections, it did not intend for the common council to prescribe such rules and regulations.

The Act of Congress, March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), prescribes the qualifications for electors in the Territory of Alaska. It goes no further. It does not prohibit registration either expressly or by implication. No mention is made regarding registration or the procedure governing the conduct of elections at which such electors are to vote. The failure of Congress to supply these necessary details and to establish such procedure indicates that it was the intention of Congress that such be done by the Territorial Legislature or municipal councils. This position finds support in *In re Opinion of Justices*, 247 Mass. 583, 143 N. E. 142, in which a communication from the Justices of the Supreme Judicial Court of the State of Massachusetts relative to the meaning and scope of the term "legal voters," as used in certain amendments of the Constitution relating to the taking of the decennial census, was addressed to the Senate and House of Representatives. This communication bore the signature of the seven Justices of the Supreme Judicial Court and stated in part,

The Constitution has made no express provision for the ascertainment of those who possess the qualifications prerequisite for voting. Manifestly such an ascertainment must be made before the franchise can be exercised in an orderly and expeditious fashion. There must be an examination of the demands of persons claiming to possess the constitutional qualifications to vote, a sifting out of those who in truth possess those qualifications and a separa-

tion of those thus qualified from others who lack such qualifications. The names of those thus found to be qualified must, as a practical matter, be listed and arranged so that elections may be conducted with such speed as to enable all the large numbers of voters to exercise their franchise in a reasonable time and under proper conditions. It is within the jurisdiction of the Legislature to make suitable and wholesome laws upon this subject. That jurisdiction has been exercised continuously from the adoption of the Constitution until the present. Elaborate provisions to that end are found in the General Laws.

The position advanced by appellant is strengthened by the fact that the Legislature for the Territory of Alaska, in the year 1929, two years after the enactment of the Act of Congress of March 3, 1927, c. 363, Section 7, 44 Stat. 1394 (48 U. S. C. A. 57), enacted a bill relating to the incorporation of cities of the second class. This law, Chapter 99, Session Laws of Alaska, 1929, Section 5, sub-section Second (Section 2485, sub-section Second, C. L. A. 1933), provides as follows:

The trustees shall have the following powers:

\*                      \*                      \*                      \*

*Second:* To make rules for all municipal elections in said city of the second class.

Here the Territorial legislature enacted a law specifically giving the trustees of a city of the second class the right to make rules governing the elections in such cities. Certainly it cannot be successfully contended that the trustees of a city of the second



class are possessed of a different and greater power than that of a common council in a city of the first class.

It seems apparent that Chapter 99, S. L. A. 1929, section 5, subsection 2, is not inconsistent with the provisions of Section 57, Title 48, U. S. C. A., and, consequently, is not void by virtue of Section 9 of the 1912 Organic Act of Alaska. Otherwise, it may be assumed that Congress would have taken action to nullify the Territorial statute. Section 20 of the 1912 Organic Act provides that "All laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect" (48 U. S. C. A. 90). It follows that Chapter 99, S. L. A. 1929, must have been submitted to Congress. The fact that Congress has taken no action to disapprove the statute is "significant," (*Christianson v. King County*, 239 U. S. 356, 366) and compels the conclusion that the law has received the implied sanction of Congress, having been upon the statute book for more than eighteen years.

If Congress has sanctioned the grant of power to the trustees of a city of the second class to "make rules for all municipal elections" it would not seem that it could logically be contended that it intended that this power be denied to common councils of a city of the first class. The more logical conclusion would be that the power "to make suitable provisions for municipal and other elections" was intended by Congress to grant to the common councils in a city of the



first class the power not only to provide for elections, but also the power to make rules and regulations governing the conduct of such elections.

There is nothing contained in Section 7 of the Act of March 3, 1927, c. 363, 44 Stat. 1392, 48 U. S. C. A. 57, nor in any other section of the Act, that would tend to indicate that Congress intended to prohibit registration. On the contrary, it would seem that an argument may be made that Section 3 of the Act explicitly recognizes that registration might be required, for it is there provided:

Every person, except as otherwise provided in section 1 of this Act, desiring to vote at any such election, before being permitted to vote, shall, without the aid or assistance of any person whomsoever, legibly sign his or her own full name, and write his or her own sex and address, in the REGISTRATI<sup>Ō</sup>N or poll book  
\* \* \*. [*Italics supplied.*]

In addition, the Act shows on its face, and the legislative history is in accord, that it was passed primarily for the purpose of prescribing a literacy test for voters in Alaska.

What legislative history there is concerning the Act indicates that Congress did not intend to prohibit registration.

Senate Report 1645, 69th Cong., 2d Sess., on the bill, H. R. 9211, states, among other things, in quoting from the House Report:

The bill provides that every person, before being allowed to vote, shall, without the aid or assistance of any person whomever, legibly

sign his or her full name, and write his or her sex or address in the registration or poll book.

In the House, an amendment to the Bill was proposed as follows (68 Cong. Rec. 3977):

And provided further, that this act shall not apply to any citizen who has legally voted at the general election of November 4, 1924.

In the debate on this proposed amendment it was substantially recognized that voters in Alaska might be required to register. The following discussion resulted from a query (68 Cong. Rec. 3977) as to what would happen regarding those persons who did not vote in the 1924 election, but had previously voted, in view of the fact that election returns were destroyed each year (68 Cong. Rec. 3978):

Mr. VAILE. Is not it the usual rule that when a man has previously been registered fails to vote at this present election he is off the registration list and has to register again?

Mr. STRONG, of Kansas. In many of our election laws that is the fact.

Mr. VAILE. And is not the gentleman following the usual practice by this bill?

Mr. STRONG, of Kansas. Yes.

The amendment was agreed to and the bill was passed (68 Cong. Rec. 3978).

The only discussion in the Senate regarding the bill is reported as follows (68 Cong. Rec. 5221):

The bill (H. R. 9211) to prescribe certain of the qualifications of voters in the Territory of Alaska, and for other purposes, was announced as next in order.

Mr. LAFOLLETTE. Let the bill be read.

The PRESIDING OFFICER. The Clerk will report the bill.

SEVERAL SENATORS. Over!

Mr. DILL. Mr. President, I wish Senators would withhold their objection for a moment. This bill simply requires the voters of Alaska to have the same requirements that we have in the State of Washington.

Mr. LAFOLLETTE. I withdraw my objection.

Mr. KING. I would like to ask the Senator what right we have to prescribe the qualifications of the voters of Alaska? They have a territorial legislature.

Mr. DILL. The territorial legislature, I think, is satisfied with this regulation. I hope the Senator will not object to the consideration of the bill.

Mr. KING. I think it is paternalism, wholly unjustified, but I will not object.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

It would seem, therefore, that the Act of March 3, 1927, in no way prohibits the enactment by an Alaskan municipality of an ordinance requiring registration of voters.

While it may be conceded that the legislature may not abridge the right of an elector to vote by requiring from him qualifications additional to those required by the Constitution, it is well settled that registration laws, whether enacted under express or implied constitutional provision, do not, when reasonable, require of the voter additional qualifications, so

as to render them unconstitutional or beyond the power of the legislature to enact. Such laws may generally be sustained as a regulation of the right to vote, if they afford to the voter reasonable opportunity to register and vote. Such statutes are said merely to provide a means of furnishing proof of the existence of the qualifications required by the Constitution. It is not necessary, in order to sustain the power of the legislature to enact registration laws, that there should be a specific or express authorization in the Constitution to that effect. Even in the absence of such constitutional authorization (and *a fortiori* in its presence), the power of the legislature to enact such laws is generally recognized. The theory is that the Constitution in providing for the voters qualifications contemplates the enactment of laws to determine the existence of those qualifications.

*U. S. v. Quinn*, 8 Blatchf. 48, Fed. Cases No. 16, 110.

*McMahon v. Savannah*, 66 Ga. 217, 42 Am. Rep. 65.

*Blue v. State ex rel. Brown*, 206 Ind. 98, 188 N. E. 583.

*State v. Butts*, 39 Kan. 537, 2 Pac. 618.

*Perkins v. Lucas*, 197 Ky. 1, 246 S. W. 150.

*Capen v. Foster*, 12 Pick. (Mass.) 485, 23 Am. Dec. 682.

*Re Opinion of Justices*, 247 Mass. 583, 143 N. E. 142.

*State ex rel. Pine v. Board of Education*, 158 Minn. 459, 197 N. W. 964.

*State ex rel. Meyer v. Woodbury*, 321 Mo. 275, 10 S. W. 2d. 524.



*State ex rel. Carroll v. Superior Court*, 113 Wash. 54, 193 Pac. 226.

*State ex rel. Boyle v. Board of Examiners*, 21 Nev. 67, 24 Pac. 614.

*State v. Weaver*, 122 Tenn. 198, 122 S. W. 465.

*Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272.

*Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95.

*People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 5 N. E. 596.

The qualifications of voters in the Territory of Alaska are established by an Act of Congress rather than by a state constitution. However, there is nothing contained in the Act of March 3, 1927, which would prohibit the Territorial legislature, or the common council of the City of Anchorage, from enacting a registration statute, and it is apparent that the common council had the power to enact an ordinance establishing a system of registration of voters for the City of Anchorage. When we consider the fact that Congress specifically granted the power to common councils of the cities of the first class "to make suitable provisions for municipal and other elections \* \* \*," this conclusion is inescapable.

Granted that the common council of the City of Anchorage has the power to enact a registration ordinance, we are then confronted with the question as to whether an ordinance, such as Ordinance No. 51 of the City of Anchorage, requiring, as it does, registration prior to the day of the election, is a regulatory measure or whether it is so unreasonable and inconsistent



with the Act of March 3, 1927, that it is null and void. The provisions of the Act of March 3, 1927, require that electors shall have resided continuously for thirty days next preceding the election in the precinct in which they vote. Ordinance No. 51 (R. 7-12) provides that the registration books shall open at least sixty days prior to the general municipal election and that they shall be closed on Saturday at 5:00 p. m. o'clock next prior to any municipal election. Ordinance No. 17 (R. 28-45) provides that there shall be a general municipal election held in the City of Anchorage annually on the first Tuesday of April of each year. It will, therefore, be seen that, under the provisions of Ordinance No. 51, the registration books are open and available to qualified electors for a period of time thirty days greater in length than the period of residence required under the provisions of Section 7 of the Act of March 3, 1927. Also, that the registration book is closed for only two days, one of which is Sunday, immediately prior to the general municipal election.

It is recognized that the cases of *White v. Multnomah County*, 13 Or. 317, 10 Pac. 484, 57 Am. Rep. 20, *Dells v. Kennedy*, 49 Wis. 555, 6 N. W. 246, and *Daggett v. Hudson*, 43 Ohio St. 548, 3 N. E. 538, represent a minority view holding that statutes requiring registration prior to the day of election are to be considered unconstitutional and void.

In the case of *White v. Multnomah County*, *supra*, the Supreme Court of the State of Oregon, in an opinion by a divided court, held that under the Oregon constitution, which prescribes the qualification of vot-

ers, and makes no provision for registration laws, any statute which requires previous registration as a prerequisite to the right to vote is *ipso facto* void.

It is submitted that the dissenting opinion in the *White* case is the opinion in harmony with the weight of authority and is more consistent with logic and good reasoning than the opinion of Chief Justice Waldo, in which Justice Lord concurred. In the dissenting opinion Justice Thayer states:

It is contended that the regulation is not reasonable because the right to register is not continued until the day of the election. I suppose the legislature deemed the three-days session of the board as sufficiently long to enable the voters in the precinct to register, and that the provision for those who were sick, or absent therefrom, as ample time to enable them to do so, and, conceding that the legislature has the right to require such registration prior to the time of the election, it has the right to judge as to what would be a reasonable time for the purpose. Whether it has judged correctly or not will be ascertained by the practical working of the law. A person would naturally suppose that the voters of a precinct could all register in three days as well as vote in one. They certainly would do so if they attached that importance to the elective franchise that good citizens should. This law will doubtless subject many citizens to considerable inconvenience, but they had better submit to that than have their voice stifled by the admission to the privilege of a horde of lawless mercenaries and repeaters. The citizens duty is not fully discharged when

he has deposited his ballot; he should attend to it that no spurious or illegal vote counteracting the effect of his own be cast. Elections are but a travesty where every vagabond may vote without restraint. It is no privilege to vote when an irresponsible wretch can be imported to vote, or hired to repeat his vote. Elections may as well be turned over to the hoodlum element of the community to manage and control, if citizens are unwilling and refuse to submit to the inconvenience a registry law imposes.

\* \* \* \* \*

I am of the opinion that the registry act in question is not unconstitutional; that the legislature has power to provide the mode it has in order to ascertain who are qualified electors, under the constitution; and that the provisions of the act are not so unreasonable as necessarily to deprive voters from the exercise of the right of suffrage; \* \* \*

In *State v. Christ*, 179 Pac. 629, 634, the Supreme Court of the State of New Mexico, in an opinion by Chief Justice Parker, in which District Judges Leahy and Hickey concurred, the following comment was made regarding the *White* case:

*White v. Multnomah County*, 13 Or. 317, 10 Pac. 484, 57 Am. Rep. 20, is cited. This case was one where the Oregon Court under the constitutional provision which prescribed in detail the qualifications of electors, and provided that all such electors should be entitled to vote at all elections authorized by law, held that a statute which required previous registry as a pre-requisite to the right to vote was ipso facto

void. This doctrine is pronounced to be unsound by Judge Cooley in Cooley's Con. Lim. p. 906, and Mr. McCrary in McCrary on Elections, Sections 130, 131, 132, shows that the holding in the Oregon case is unsound *both upon reason and weight of authority.* \* \* \* [Italics supplied.]

In *City of Portland v. Coffey*, 67 Or. 507, 135 Pac. 358, the Supreme Court of the State of Oregon stated:

Section 2 of article 2 of the Constitution of this state, as amended November 5, 1912 (Laws Or. 1913, p. 7), prescribes the qualifications of electors. Though the legal right of a citizen is thus recognized, it is conceded that the legislative assembly may by reasonable enactment protect the right so as to preclude disqualified persons from voting, *and that any registration law which tends to purify the ballot and to prevent repeating ought to be upheld in the interest of good government.* When, however, such legislation trenches upon the authority conferred by the Organic Act upon legal voters so as to prevent them from exercising the right of suffrage, the courts must, when properly appealed to, set aside such enactments as are violative of the provisions of the fundamental law. [Italics supplied.]

In McCrary on Elections, Fourth Edition, Section 132, pp. 99, 100, in discussing the constitutionality of acts requiring registration prior to the day of election, we find the following statement:

The opposite view has, however, been expressed by the Supreme Court of Wisconsin in *Dell v. Kennedy*, by the Supreme Court of Ohio



in *Daggett v. Hudson*, and by the Supreme Court of Oregon in *White v. County of Multnomah*. In the first named case there was a strong dissenting opinion by Taylor, J., and in the last by Thayer, J. In the case of *Daggett v. Hudson* much stress is laid upon the fact that by the Constitutions of many States registration laws are either authorized or required to be enacted. The inference is drawn that in those States where the Constitutions are silent upon the subject the power to enact such a statute as we are now considering does not exist. But it is to be observed that the Constitution of no State defines the character of the registration law which may be enacted, or provides that registration prior to the day of election may or not be required. It is believed that no case goes so far as to deny the power of the Legislature of a State to pass a registration act, when the Constitution is silent upon the subject. This being so, the question we are considering is not affected by the presence or absence of a constitutional provision authorizing the Legislature to pass such an act. The power exists in either case, and in either case the question must be the same, viz.: whether the act when passed merely regulates the exercise of the right to vote, or goes further and impairs it.

In construing the provisions of Ordinance No. 51, such construction must, of course, be made by reference to established judicial precedent. It is recognized by the weight of authority that statutes requiring registration prior to the day of the election are constitutional, that they do not add an additional qualifica-



tion but are a method of providing a system requiring electors to furnish proof of the existence of the qualifications prescribed by the constitution and merely regulate the right of suffrage.

The power of the legislature to provide for the registration of voters under, or in the absence of, express constitutional authority is recognized by the great weight of authority as is reflected in the following cases.

In *Capen v. Foster*, 12 Pick. (Mass.) 485, 23 Am. Dec. 682, the plaintiff possessed the qualifications prescribed by the constitution but was refused the right to vote because his name was not on the list of qualified voters as required. The constitution did not require that plaintiff's name be borne on any list. The question submitted was whether a statute requiring the plaintiff's name to be listed was constitutional. The plaintiff was nonsuited, the Court stating:

The Constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing these qualifications, must at some time be had by those who are to decide on them. The time and labor necessary to complete these investigations must increase in proportion to the increased number of voters; and indeed in a still greater ratio in populous commercial and manufacturing towns, in which the inhabitants are frequently changing, and where of necessity many of the qualified voters are strangers to the selectmen.

If, then, the Constitution has made no provisions in regard to the time, place, and manner

in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent to the legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and procure the exercise of that right.

And this court is of opinion, that the provision in the general law regulating elections, and that in the act incorporating the city, which requires that the qualifications of voters shall be previously offered and proved, in order to entitle them to vote, that their names shall be entered upon an alphabetical register or list of voters, is highly reasonable and useful, calculated to promote peace, order, and celerity in the conduct of elections, and as such, to facilitate and secure this most precious right to those who are by the constitution entitled to enjoy it; that it can not be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting, which it was competent to the legislature to make, and therefore that these legal enactments, not being repugnant to the constitution, are valid and binding laws, to which both voters and presiding officers at elections are authorized and bound to conform.

In *State v. Butts*, 31 Kan. 537, 2 Pac. 618, the constitutionality of the registration act of the State of Kansas was challenged. The Constitution of the

State of Kansas directed the legislature of that State to enact suitable registration laws. The provisions of the Kansas act are practically indential with those of Ordinance No. 51 of the City of Anchorage, except that the Kansas act provided that the poll books were to be open at all times during the year for registration except during the ten days prior to any election. In reversing the case and thereby holding the Kansas registration act to be constitutional, the Court stated:

In conclusion, we think it may be affirmed that, under the requirements of our constitution, it is the duty of the legislature to provide for a registration of voters; that it may provide that such registration be completed prior to the day of election, provided that ample facilities and time for registering are prescribed; and that it may also provide that one not registered shall not be allowed to vote.

In *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 5 N. E. 596, the Illinois constitution of 1848 made no provision for any action of the legislature in reference to the registration of voters. An Illinois statute passed in 1888 provided for registry on the third and fourth Tuesdays before the election day, and prohibited registration between the said third Tuesday and election day, with the consequence that the vote of any person whose name did not appear upon said registry as a qualified voter three weeks before the election day was not to be received. It was contended that the legislature had no authority to require that the registry be closed three weeks before the election, and to prohibit a man from voting because he had not

established his qualifications three weeks before the day for voting. In repudiating this contention, the court stated:

If it be admitted that the legislature can require a voter to establish his qualifications before election, it is difficult to see why, upon principle, or as a question of power, it cannot require such proof to be made as well three weeks before the day for voting, as ten days or five days, or even one day, prior thereto. The real question involved in the objection is whether any man can be prevented from voting who proves, or offers to prove on the day on which he seeks to cast his ballot, that he is a legal voter. If cases can be supposed where the three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. This mode of reasoning, carried out to its logical sequence, will make any kind of a registry law unconstitutional. For it would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time and on the same day. If the legislature has the power to direct the registry to be completed before election day, and if, in its wisdom and under a sense of its responsibility to the people, it has said that three weeks before election is a reasonable date for the completion of the registry, shall this court substitute its judgment for that of the lawmaking power, and say that a shorter time would have been more reasonable?



The court further said:

If closing the registry three weeks before election may deprive a few persons, becoming qualified during that period, of the privilege of casting their ballots, keeping it open until a late date may admit to the polls hundreds of persons who should never have been allowed to vote. When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed. \* \* \* Where the lawmaking department of the government, in the exercise of a discretion, not prohibited by the Constitution, has declared that a certain period of time is needed for a specified investigation, it is not the duty of this court to declare that such period is unreasonably long.

In *State ex rel. Pine v. Board of Education*, 158 Minn. 459, 197 N. W. 964, it was contended that the registration act was unconstitutional in that it unreasonably restricted the right to vote. Section 3 of the 1923 Act provided:

From and after the first (day) of January, 1924, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this act.

Section 8 provided:

The commissioner of registration shall have 15 full days between the last day of registration and election day, to perfect his election registers and for that purpose 15 days before any election day shall be days upon which voters may not register.



The court stated:

The constitution provides that a citizen of the United States, who has been such for three months, and "Who has resided in this state six months next preceding any election, shall be entitled to vote at such election in the election district in which he shall at the time have been for thirty days a resident, for all officers that now are, or hereafter may be, elective by the people." Article 7, Section 1.

It is the contention of the board that the Act of 1923 in disqualifying qualified voters under the Constitution from voting in the event that they do not register at least 15 days before the election is an unreasonable limitation and is unconstitutional. That the Legislature may provide a system of registration, although the Constitution authorizes none, is not in doubt. It must be such as not unreasonably to interfere with the right of a qualified voter to vote. Cases differ as to what limitations may be properly imposed through the requirement of registration. Many of them are collected in 20 C. J. 81; 9 R. C. L. 1036, Sections 52-55, 25 L. R. A. 480; Paine on Elections, Section 340; McCrary on Elections, Sections 126-138. In our judgment the limitation placed upon the constitutionally qualified citizen by the registration act of 1923 is reasonable and the statute constitutional.

In *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95, the Court in its opinion stated:

The Constitution permits the legislature to prescribe regulations for the conduct of elec-

tions. Section 129. Under such provision, *or even without it*, the legislature may prescribe reasonable regulations to prevent fraud, preserve order, and insure a fair election, and to that end may prescribe the method by which the qualifications of those offering their votes as electors may be proved, and prohibiting them from voting or their votes from being received if offered, unless such proof is made. \* \* \*  
[Italics supplied.]

In *Blue v. State ex rel. Brown*, 206 Ind. 98, 188 N. E. 583, the Court quoted from Cooley on Constitutional Limitations (8th Ed.), vol. 2, pp. 1368, 1369 and 1370, as follows:

In some of the States it has also been regarded as important that lists of voters should be prepared before the day of election, in which should be registered the name of every person qualified to vote. Under such a regulation, the officers whose duty it is to administer the election laws are enabled to proceed with more deliberation in the discharge of their duties, and to avoid the haste and confusion that must attend the determination upon election day of the various and sometimes difficult questions concerning the right of individuals to exercise this important franchise. Electors also, by means of this registry, are notified in advance what persons claim the right to vote, and are enabled to make the necessary examination to determine whether the claim is well founded, and to exercise the right of challenge if satisfied any person registered is unqualified. When the Constitution has established no such rule, and is entirely silent on the subject, it has sometimes

been claimed that the statute requiring voters to be registered before the day of election, and excluding from the right all whose names do not appear upon the list, was unconstitutional and void as adding another test to the qualifications of electors which the Constitution has prescribed, and as having the effect, where electors are not registered, to exclude from voting persons who have an absolute right to that franchise by the fundamental law. This position, however, has not been generally accepted as sound by the courts. This provision for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised. \* \* \*

In *Weil v. Calhoun*, Circuit Court, Northern District Georgia, 25 Fed. 865, in which objection was made that the registration act made no provision for the registry of persons who, though not entitled to vote when the books were closed, yet became so during the 10 days intervening after the closing of the books and the registration, the Court said:

I am inclined to the opinion that the fact the registration law makes no provision for the registration of those who become competent to vote after the registration is closed, and before the election, does not vitiate the registration. If the period between the registration and election be brief, and only such as is proper for making out and putting in proper shape the registration papers, it seems to me that both reason and authority sanction such registration laws. The authorities are in conflict; but, in my judgment, sound sense and a due regard to the true interest of the state should lead a court to sus-

tain such laws as strike but a prelude and preparation for the election and a part of its machinery, even though some days intervene between the close of the registration and the actual opening of the polls. It is self-evident that some time must be taken for making out the returns of the registration and putting them in shape for use at the polls, and whether this shall be one hour, or one, two, or ten days, would seem to depend on the legislative will, and, if not grossly excessive, ought to be sustained.

In *People ex rel. Frost v. Wilson*, 3 Hun. (N. Y.) 437 (reversed on other grounds in 62 N. Y. 186), the Court said:

The power of the legislature to pass a registry law whereby the name of every elector is required to be placed upon a register before the day of voting in order to entitle him to vote is not denied. It enables the legal voter to protect the ballot box against the votes of persons not legally entitled to vote; and, to be of any substantial benefit, it must be made and completed a sufficient length of time before the election to allow an investigation of the qualifications of the persons whose names are registered. To render the register of any value, there must be some forfeiture if the person who desires to vote has not proved his name to be registered, and that forfeiture should be, as it is, of his right to vote at the election for which such registry is prepared. To allow names to be entered upon the list at the time votes are offered is to defeat the purpose which the legislature had in view in framing the law, to wit, the prevention of illegal voting.



The measures that shall be adopted to secure that end are entirely in the discretion of the legislature.

Consequently, the statute of New York providing that no vote should be received at any annual election unless the name of the person offering to vote be on the registry list, made and completed preceding the election, was held constitutional.

In *Com. v. McClelland*, 83 Ky. 686, it was held that a registry law which gives opportunity of registration to the voter for three days prior to the election need not, in order to be valid, make provision for the examination on the day of election of the qualification of voters who could not avail themselves thereof. The court said:

It might, perhaps, be proper to make provision for the registration at some other time before the day of election, of those unavoidably absent during the three days; but we do not perceive how the constitutional privilege of a qualified voter is taken from him when he is afforded a reasonable opportunity before the election to register.

In *Jaycox v. Varnum*, 39 Idaho 78, 226 Pac. 285, under a statute providing that, "all persons offering to vote at any election are subject to challenge, as provided by the election laws, but registration of any elector's name is prima facie evidence of his right to vote, and no person shall vote unless he is first registered," C. S. Section 565, the Court stated:

The holding of the trial court that the vote of Mrs. Hunt was illegal was correct. She did



not apply for registration until the day before election, which was after the registration books had been closed. No reason was given for her lack of diligence. In fact, she made no effort to register at all, but was sought out by election officers and procured to subscribe the elector's oath and her name was enrolled by the registrar after the statutory period for registration had closed.

In its opinion the Court quoted *Earl v. Lewis*, 28 Utah 127, 77 Pac. 238, as follows:

While the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the Legislature or the malfeasance or misfeasance of a ministerial officer, the voter himself may waive the exercise of the right, and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, or neglects to properly apply for registration.

In *City of Pond Creek v. Haskell*, 21 Okla. 711, 97 Pac. 338, and *Incorporated Town of Lehigh v. Thomas*, 21 Okla. 901, 97 Pac. 362, it was held that a statute requiring that all voters of all cities of the first class to register as a prerequisite condition to the exercise of their right of suffrage, in view of Const. art. 3, sec. 7, authorizing the Legislature, when necessary, to provide for the registration of electors throughout the state, or in any incorporated city or town, is not violative of the fourteenth amendment of the Federal Constitution, nor of Const. Okl. art. 3, sec. 7, providing that all elections shall be free and equal.

In *State ex rel. Hyland v. Peter*, 21 Wash. 243, 57 Pac. 814, under statutes requiring persons to be registered prior to the day of election, and further providing that persons not registered were not entitled to vote, it was held that it was no excuse for failure to register, that the voter was a member of the City Fire Department and was prevented from registering by his duties as a fireman, that he was not entitled to vote.

In *Turner v. Fogg*, 39 Nev. 406, 159 Pac. 56, it was contended that an act of the legislature of Nevada was void because of a provision which limited the right to vote at the primary election only to electors who had duly entered upon the register a designation of their party affiliation. The court held that the requirement for registration of party affiliation as a prerequisite of the right to vote was a reasonable regulation and a valid exercise of the legislative power.

In *McMillan v. Siemon*, District Court Appeal, Fourth District, California, 98 Pac. 2d, 790, 794, it is stated:

The constitution does not prohibit the enactment of laws, either by the legislature or by the people by means of the initiative or referendum, which require electors to register as a condition precedent to exercising their privilege of voting and provide for reasonable methods of registration. "Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only ascertaining who are qualified electors, and to prevent persons who are not such electors from voting." *Bergevin v. Curtz*, 127 Cal.

88, 59 Pac. 312. Such laws, therefore, do not contravene the constitutional provisions relating to the qualifications of electors. *People ex rel Martin v. Worswick*, 142 Cal. 71; 75 Pac. 663.

A statute must, if possible, be so construed as to be constitutional. The application of this principle is reflected in the case of *Oregon-Washington R. & Nav. Co. v. U. S.* (D. Ore.) 47 F. 2d 250, 256, wherein it was stated, "If a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, it is the duty of the courts to adopt the latter." The Supreme Court of the United States in affirming the judgment, 288 U. S. 14, 40, stated, "Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In *Edwards v. United States*, 91 F. 2d 767, 785, this Court applied the principle stated in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, "the cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." In the *Edwards* case this Court also quoted from Mr. Justice Van Devanter's opinion in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, as follows, " \* \* \*

if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.”

In *Territory v. Northern Commercial Co.*, 6 Alaska Reports 754, it was held that “It may be premised that courts will not pronounce an act of the Legislature void or unconstitutional, unless such unconstitutionality appears beyond a reasonable doubt.”

*In re Boswell*, CCA 9, 96 F. 2d 239, 241, applied the principle declared in *Ogden v. Saunders*, 12 Wheat. 213, 270, 6 L. Ed. 606, that: “It is but a decent respect due to the wisdom, the integrity and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”

In applying the foregoing principles of statutory construction to the present case it would seem that this court would be bound by the weight of authority holding that registration acts requiring registration prior to the day of election are valid, if reasonable in their terms, and that the only conclusion which could be reached by this court is that Ordinance No. 51 adopted and approved by the Common Council of the City of Anchorage on the 17th day of September 1924, is not inconsistent with the Constitution of the United States or any act of Congress and is, therefore, valid.

Counsel for appellees may concede that acts requiring registration prior to the day of election are constitutional where there is a State constitution providing for registration, or even where the State constitution is silent, but may maintain that where the qualifications of voters are established by an act of Congress



rather than a State Constitution, as is true in the instant case, the Territorial legislature or a municipal council does not have the power to enact such laws.

It would seem that such a contention is without basis either in logic or in precedent. As previously set forth, Section 9 of the 1912 Organic Act of Alaska (Act of August 24, 1912, c. 387, Sec. 9, 37 Stat. 512, 514, 515, 48 U. S. C. A. Sec. 77) provides in part as follows:

The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; \* \* \*

There is nothing in Ordinance No. 51 that is in any manner inconsistent with the Constitution or any law of the United States. The fact that Congress has enacted a law establishing the qualifications of voters does not prohibit the Territorial legislature or a municipality from legislating on the same subject unless such legislation is inconsistent with "the Constitution and laws of the United States."

The organic Act of 1912, cited *supra*, also provides:

nor shall the legislature or any municipality interfere with or attempt in any wise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States Marshal or any of his deputies, or any police officer, and destroyed; \* \* \* and all acts passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section \* \* \* shall be null and void \* \* \*.



In *Patterson et al. v. Jones*, C. C. A. 9, 143 F. 2d 531, in an appeal from the District Court for the Third Division of the Territory of Alaska, the defendant was charged and convicted of a violation of Section 3, Chapter 56 of the Session Laws of Alaska, 1919. He was sentenced to six months in the Federal Jail. Defendant filed a petition for a writ of habeas corpus alleging that the judgment was based upon his conviction for the crime of maintaining a gambling place contrary to said Section 3, Chapter 56, S. L. A. 1919; he further alleged that that statute was void as having been passed by the legislature of the Territory of Alaska in violation of Section 9 of the 1912 Organic Act of Alaska. A writ of habeas corpus issued and appellants filed a return thereto which simply recited that appellee had been confined under the judgment of the United States Commissioner's Court from October 15 to October 17, 1942, having on the latter date been released on bail pending a hearing on the writ of habeas corpus. Appellee filed a demurrer to the return, and a hearing thereon was held October 27, 1942.

Section 152 of the Criminal Code of the Territory of Alaska (Act of March 3, 1899, Title I, c. 429, 30 Stat. 1253, 1275, (Sec. 4892, Compiled Laws of Alaska, 1933)) defines the crime of gambling and provides: "And upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in jail until such fine and costs are paid; provided that such person so convicted shall be imprisoned one day for every two dollars of such fine

and costs; and provided further, that such imprisonment shall not exceed one year.”

Section 3, Chapter 56, of the Session Laws of Alaska, 1919, (Sec. 4985, Compiled Laws of Alaska, 1933), defines the crime of maintaining a gambling place and provides: “And upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the federal jail for not less than thirty days nor more than six months, or by both such fine and imprisonment, for each offense.”

The District Court subsequently sustained the demurrer and filed findings of fact and conclusions of law in which it concludes that the portion of Section 4985 of the Compiled Laws of Alaska, 1933 (Sec. 3, c. 56, S. L. A. 1919), providing for punishment by imprisonment for the offense defined therein, is void as far as the judgment in this case is concerned as being in conflict with the provisions of Section 9 of the Organic Act of Alaska.

In reversing the decision of the District Court, this Court held: “The congressional stricture upon the legislative bodies of the Territory of Alaska and its municipalities that they should not ‘interfere with or attempt in any wise to limit the Acts of Congress to prevent and punish gambling \* \* \*,’ does not bar such bodies from legislating in regard to the subject matter of gambling. It does, however, bar the territorial legislature from enacting laws that would in any manner run counter to the spirit and effect of the congressional enactments against the evil of gambling.

Although the two acts are not exactly parallel, from a practical standpoint they run in the same direction, and the charge here in all probability could have been laid under either act."

If the Territorial legislature had the power to legislate to the extent that it did in Section 3, Chapter 56, S. L. A. 1919, on the subject of gambling, notwithstanding the specific prohibition contained in the Organic Act of Alaska, certainly the power of such body or of a municipal council to legislate where the Act of Congress does not contain such a prohibition, but is merely silent, cannot be denied.

In the oral decision granting the Motion to Quash (R. 17-18), the District Judge stated, "and also I am impressed by the fact that there has been no repeal of Ordinance 17. It is still on the books and is referred to even in the later ordinance showing that the council considered it to be still on the books." It is difficult to undersand why the learned District Judge should be impressed by this fact. Certainly there could have been no repeal of Ordinance No. 17 intended by Ordinance No. 51 when the terms of Ordinance 51 expressly referred to and incorporated a portion of such ordinance.

While references are not available to enable the writer to accurately determine the legislative history of certain statutes of the State of Washington, it appears that prior to the year 1933, an analogous situation existed under the election laws of that State. Sections 5325 to 5329 inclusive, Volume 6, Remington's Revised Statutes of Washington establish the

manner in which a voter might be challenged. It appears that those sections of the Washington Statutes had their origin in the laws of 1866.

Subsequent to the enactment of the above-mentioned sections of the Statutes, and apparently in 1890, the Washington Legislature enacted a statute which appears in Volume 6 of Remington's Revised Statutes of Washington as Section 5127. Section 5127 provides, "No person shall be entitled to vote at any election in any such city, town, or precinct who is not registered according to the provisions of this Act; \* \* \*. The registration shall not be conclusive evidence of the right of any registered person to vote, but said person may be challenged and required to establish his right at the polls in the manner as may be required by law." The manner required by law was, at that time, the manner set forth under Sections 5325 to 5329 inclusive.

Section 5127, Washington Statutes, provides for the challenge of a registered voter in "the manner as may be required by law." The manner required by law was in existence at the the time Section 5127 was enacted. Section 5127 did not attempt to repeal Sections 5325 to 5329, but made a reference thereto. Both were in existence concurrently after Section 5127 was enacted in 1890. The enactment of Section 5127 did not render any of the sections referred to unconstitutional or void. This system of registration and challenge apparently was the system followed in the State of Washington until a new system of registration was established by legislation in 1933.



It is significant to note that in the year 1893, in the case of *State ex rel. Hyland v. Peter*, 21 Wash. 243, 57 Pac. 814, it was held that, under the provisions of Section 5127 requiring voters at the municipal election in the city of the third class to be registered, as a condition precedent to the right to vote, a member of the fire department of the city who was not registered, could not vote, even though he was prevented from registering because of his duties as a fireman. This case was cited with approval by the Supreme Court of the State of Oklahoma in 1936 in the case of *In Re Initiative Petition No. 142, State Question No. 205*, 55 P. 2d 455, 460.

While the second ground of defendants' Motion to Quash, namely, that the petition upon which the order to show cause was based did not state facts sufficient to constitute a cause of action, was not considered or passed upon by the District Court, it is possible that this point will be urged on appeal.

When the reasons upon which the District Judge based his order to quash are considered, it is readily recognized that it would have mattered little whether the complaint did or did not state a cause of action. Had the ruling of the District Court been based on the insufficiency of the complaint, an amended complaint could have been filed or, if the original complaint did not state a cause of action, a new complaint could have been filed in which a cause of action would have been stated. To have attempted to amend the original complaint, or to have filed a new complaint,



would have been a futile gesture in this case in view of the nature of the ruling of the District Judge.

It is appellant's contention that the complaint does contain facts sufficient to state a cause of action. However, if the case is reversed and remanded and the District Court later decides that the complaint is insufficient in its present form, this Court may rest assured that an amended complaint or, if necessary, a new complaint will be filed in which a cause of action is stated.

Appellant's contention is based upon the fact that, although by statute the writ of quo warranto has been abolished, the statutory action created is in its nature an action in quo warranto. The remedies formerly obtainable under the writ of quo warranto are now had under the statutory proceeding.

The complaint in the present action is taken from the case of *George Bartlett, et al. v. State of Kansas*, 13 Kans. 79. Paragraphs IX and X of the complaint (R. 5, 6) are, in substance, identical with the complaint in the *Bartlett* case. The petition in the *Bartlett* case set forth and alleged,

that the city of Clyde, in said county and state, is a city of the third class, under and by virtue of the general laws of said state; that by the same laws there has been created and exists in said city, for the purpose of good government thereof, and for the purpose of promoting the general welfare of the inhabitants thereto, the offices of mayor, five councilmen, and police judge; that on or about the third of April, 1873, at and within said city, and within the jurisdic-

tion of this court, the said defendant Bartlett did unlawfully usurp and intrude himself into the said office of mayor of said city of Clyde, the said defendants McNulty, Ransopher, Dobbs, Campbell, and Heller did then and there unlawfully usurp and intrude themselves into the said offices of councilmen, and the said McCrea did then and there unlawfully usurp and intrude himself into the said office of police judge; and each and every of said defendants from thence hitherto have continued unlawfully to hold and exercise the said offices respectively so as aforesaid usurped by them respectively, the said offices then and there being public offices under and by virtue of the laws of said state, the said defendants from the date last aforesaid to the present time having unlawfully usurped the city government of said city; and that said defendants from the date last aforesaid to the present time, have respectively continued, and still continue, unlawfully to hold and exercise the said offices so as aforesaid respectively unlawfully intruded into by them; and the plaintiff further shows that no other person or persons is or are by law entitled to hold or exercise any of said offices. Wherefore the plaintiff demands judgment that the said defendants be ousted from said offices so by them respectively unlawfully held and occupied.

To this petition a demurrer was filed, one of the grounds being that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled and an appeal was taken from such ruling. The Supreme Court of the State of Kansas in an opinion rendered by Justice Valentine,

concurred in by all the Justices, affirmed the judgment of the court below. If the complaint in the *Bartlett* case contains facts sufficient to state a cause of action, it would seem, as contended by appellant, that the complaint in the instant case likewise contains facts sufficient to state a cause of action.

It is to be noted from the complaint in the present case (R. 2-7) that the action is brought in the name of the United States of America and not on the relation of a private party. In Bancroft's Code Pleading Practice and Remedies, vol. 4, section 4114, page 3082, it is stated:

Under some statutes pleadings in quo warranto are the same as in ordinary civil suits, and are governed by the rules relating to pleadings in such actions. Obviously an information must state a cause of action. An individual seeking office in his own right must plead facts showing title in him. *But in proceedings by the state, it is sufficient to plead, in general terms the ultimate fact of usurpation of office, without setting forth the name of the claimant to the office.* Of course, a relator is limited to allegations set forth in his complaint. [Italics supplied.]

Chapter V, Sections 802-811, inclusive, of the California Code of Civil Procedure and the provisions of Chapter 103, Sections 3824-3837, Compiled Laws of Alaska, 1933, while not identical, both deal with actions to prevent the usurpation of an office and are, in substance, the same.

In *People ex rel Stephenson v. Hayden*, District Court of Appeal, First District, Division 2, California,

49 P. 2d 314, 315, cited with approval in *City of Oakland v. El Dorado Terminal Company*, District Court of Appeal, First District, Division 1, California, 106 P. 2d 1000, 1003, a proceeding was instituted in the nature of quo warranto by the People of the State of California, on the relation of Jesse H. Stephenson, against J. Emmet Hayden. A judgment was entered for the defendant in the Superior Court but was reversed on appeal. In the opinion by Justice Nourse, concurred in by Justices Sturtevant and Spence, the Court stated:

The defendant was a member of the board of supervisors of the city and county of San Francisco, from which position he was retired on January 8, 1934. On February 16, 1934, the mayor of the city and county of San Francisco appointed defendant to fill a vacancy on said board, which position he now holds. Relator made application to sue in the nature of quo warranto in the name of the people to determine defendant's right to hold said office. The trial court sustained a demurrer without leave to amend as to the first count of the complaint and with leave as to the second count. A demurrer to the amended complaint was sustained with leave to amend, but plaintiff declined to amend, and judgment went to the defendant. The plaintiff appeals from the judgment.

The original complaint pleaded grounds upon which the pleader claimed that the defendant was unlawfully usurping the office. When the demurrer was sustained to this complaint, these were all abandoned, and the amended complaint pleaded in general terms that defend-



ant was “usurping, intruding into, and unlawfully holding and exercising the office of Supervisor. \* \* \*” The rule seems to be well settled that, in a proceeding of this character prosecuted by the state, it is sufficient to plead in general terms the ultimate fact of usurpation. *People v. Dashaway Association*, 84 Cal. 114, 118, 24 P. 277, 12 L. R. A. 117; *People v. Reclamation Dist. No. 136*, 121 Cal. 522, 523, 50 P. 1068, 53 P. 1085; *People v. Los Angeles*, 133 Cal. 338, 341, 65 P. 749. The theory upon which the rule rests is that in quo warranto the state is not required to prove the usurpation or unlawful holding, but the entire proceeding is one in the nature of an order upon the defendant to show that he is lawfully holding and exercising the office. Though the rule of pleading has been often criticized, it has not been rejected by our Supreme Court, and it is therefore binding upon us.

It would, therefore, seem that the complaint in this action, by whatever standard it may be judged, alleges facts sufficient to state a cause of action. Certainly the ultimate fact of usurpation of office has been alleged in general terms in paragraphs IX and X.

#### CONCLUSION

The population of the City of Anchorage is conservatively estimated as being approximately four or five times that which it was in 1924. Also, there are several thousand transient construction workers employed in and near Anchorage. A system of registration is much more needed today than it was in 1924 when the Common Council of the City of Anchorage

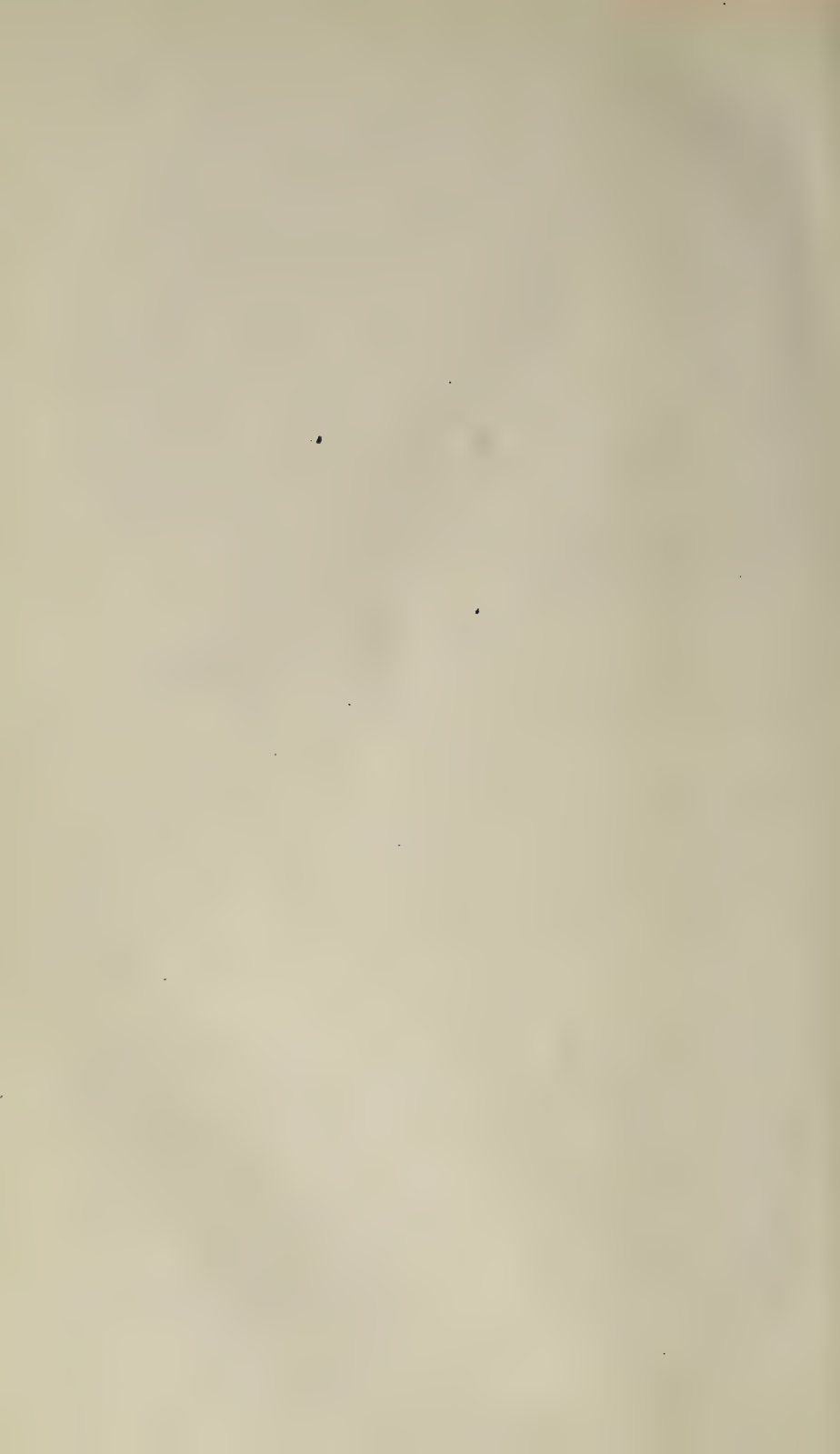


considered such a system to be necessary and desirable and enacted Ordinance No. 51.

There is nothing contained in the provisions of Ordinance No. 51 of the City of Anchorage which is in any manner inconsistent with the Constitution or any law of the United States. By the provisions of that Ordinance there is established a valid, reasonable regulation designed to prevent intimidation, fraud, bribery and other corrupt practices by providing in advance of the election an authentic list of legal voters of the city. For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted.

RAYMOND E. PLUMMER,  
*United States Attorney,*  
*Attorney for Appellant.*



No. 11708

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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UNITED STATES OF AMERICA, APPELLANT

*vs.*

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, EDWARD  
G. BARBER, L. MCGEE, CHRIS POULSON, FRED  
MAYER, DR. F. N. (Doc) DORSEY, ROBERT (BOB)  
BAKER, AND ANTON ANDERSON, APPELLEES

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY  
OF ALASKA, THIRD DIVISION

---

**BRIEF FOR APPELLEES**

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**E. L. ARNELL,**

*Attorney for Appellees.*

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PAUL P. O'BRIEN,

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*vs.*

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, EDWARD  
G. BARBER, L. McGEE, CHRIS POULSON, FRED  
MAYER, DR. F. N. (Doc) DORSEY, ROBERT (Bob)  
BAKER, AND ANTON ANDERSON, APPELLEES

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY  
OF ALASKA, THIRD DIVISION

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**BRIEF FOR APPELLEES**

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**JURISDICTION**

The Appellees concede that the Third District Court, Third Division, Territory of Alaska, had jurisdiction in this proceeding by virtue of the provisions of Chapter 103, Compiled Laws of Alaska, 1933, entitled "Actions to Avoid Charters and to Prevent the Usurpation of Office or Franchise and to Determine the Rights Thereto" and by virtue of Section 4 of the Act of June 6, 1900, Ch. 786, 31 Stat. 322, as amended (48 USCA 101).

## STATEMENT OF CASE

Appellant at the conclusion of its Statement of Facts, (B-9), asserts that there is but one question before the Court, namely, whether Ordinance No. 51 (R-11) is inconsistent with the provisions of the Act of March 3, 1927, C. 363, Sec. 7, 44 Stat. 1394 (48 U.S.C.A. 57) which prescribes the qualifications of persons entitled to vote at municipal elections in the Territory of Alaska.

Appellees, in their motion to Quash, (R-17) challenged not only the validity of Ordinance No. 51, when construed as contended by Appellant, but also the sufficiency of Appellant's complaint. Both contentions were addressed to the discretion of the Court. The Appellees, in argument, will discuss the constitutionality of Ordinance No. 51, but such argument should be considered by this Court in the light the general rules applicable to Quo Warranto proceedings.

The Appellant, in its assignment of Errors (R-23-24), assigns five grounds of error involved in the decision of the Hon. Judge Joseph W. Kehoe. These assignments of error are adopted by the Appellant in its Notice of Points To Be Relied Upon, Upon Appeal, (R-48-49). All assignments are predicated upon the general objection that the decision of dismissal was contrary to law.

Argued to the Court, but not mentioned in Appellant's statement of fact, was a circumstance significant in this controversy. On the 29th day of March, 1947, a special election was held in the City of Anchorage, and many electors—not less than 350, voted at such special election. They presumed that such registration qualified them as voters for the general election, which is the subject of this controversy, and such a presumption is supported by the manifest intent of that portion of Section 7, Ordinance 51 (R-11) which states that "nothing in this Ordinance shall be construed so as to require more than one annual registration of voters".

Also important in interpreting Judge Kehoe's decision, is the fact that for approximately fifteen years, non-registered voters were permitted to swear in at the polls and cast their ballots upon subscribing the affidavit form required by Section 23, Ord. 17, (R-38). All non-registered voters, including the number who had voted at the special election a few days before, were required to sign such oath, verifying their qualifications as voters.

Appellant's complaint, Paragraph VII and VIII (R-4-5) is based upon the single allegation of illegality of 653 votes cast by non-registered voters. No fraud, collusion, or other corrupt practices are alleged to have been committed by those 653 voters or

election officials.

Ordinance No. 51 does not expressly repeal Ordinance No. 17, so Appellees contend that the restricted interpretation placed upon Ordinance No. 17 and No. 51 by Appellant would render the latter unconstitutional and that the two ordinances should be construed together.

Appellees also contend that Appellant's complaint (R-2-7), even admitting constitutionality of Ordinance No. 51, as the basis of a satutory proceeding in the nature of common law Quo Warranto did not state facts sufficient to constitute a cause of action when addressed, as it necessarily was, to the sound discretion of the Court.

#### ARGUMENT

Appellee's argument, challenging the validity of Ordinance No. 51 is predicated upon the wording of the Act of March 3, 1927 C-363, Section 7, 44 Stat. 1394 (48 U.S.C.A. 57), which section is as follows:

"All citizens of the United States, twenty-one years of age and over, who are actual and bona-fide residents of Alaska and who have been such residents continuously during the entire year immediately preceding the election and who have been such residents continuously for thirty days next preceding the election in the



precinct in which they vote, and who are able to read and write in the English language as prescribed and provided by Section 51, of this title, and who are not barred from voting by any other provision of law, shall be qualified to vote at any of the elections mentioned in said Section 51”.

Counsel for Appellant, on pages 16-18, of his brief, has set forth excerpts from the Congressional Record pertaining to debate of various provisions of the above act, and urges that such excerpts indicate an intention upon the part of Congress to permit the enactment of registration statutes. What Congress intended, and what it actually accomplished by such act should not be confused in order to justify Appellant's contentions.

Specific authority to enact a registration statute should have been delegated directly by Congress as was done for the Territory of Hawaii. There, Congress legislated upon the subject of registration as follows:

“Section 617, Right to Vote; qualifications of electors. In order to be qualified to vote for representatives a person shall — Fourth: Prior to each regular election, **during the time prescribed by law for registration**, have caused his name to be entered on the register of voters

for representatives of his district. Act April 30, 1900, C. 339, 31 Stat. 151, (48 U.S.C.A. 617)."

If the adoption of a registration statute were proper for Hawaii, a similar one would seem necessary for Alaska.

Counsel for Appellant (B-11-12), also argues that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and **laws of the United States . . .**".

That elections are rightful subjects of legislation in Alaska would be denied by only the most corrupt politicians; however, merely because elections are rightful subjects it does not follow of necessity that either the Territory or a municipality may, for regulatory purposes, exceed the authority delegated by Congress. To argue, as the Appellant does, that registration is not a qualification but instead a regulation of the franchise, is but an evasion of the fundamental distinction between the constitutional theories of State and Territorial governments. The fundamental distinction which is universally recognized is ably set forth in the following cases:

In *Juneau Hardware Co. vs Troy*, 6 Alaska 364, the District Court reasoned as follows:

"When Alaska became incorporated in the U.S., it became a part thereof, it is true, but never-

theless, it sustained a different relation to the whole U. S. from that which the States themselves occupied. . . . ”

“ . . . Alaska has indeed been incorporated in, and is a part of, the U. S. and the constitution is in full force here, *Rasmussen vs U.S.* (197 U.S. 526, 49 L. Ed. 862) but that fact does not change Alaska from being a Territory into a State, nor render applicable to Alaska those provisions of the constitution which have to do only with the States . . . . ”.

In the syllabus, the Court further stated:

“ . . . and it is governed by Congress by virtue of that clause of the constitution which provides that Congress has power ‘to dispose of and make all needful rules and regulations respecting the Territory or other property of the U.S.’ ”.

In *Wickersham et al vs Smith et al* 7 AL. 522 and 535, we find the following language:

“the United States is subordinate to the laws of the United States and can exercise **only those powers granted**. The grant of legislative power to the Legislature contained in Section 9, of the Organic Act (48 U.S.C.A. Sec. 44, 45, 77-79), extends to all rightful subjects of legislation

not inconsistent with the Constitution and **Laws** of the United States subject to the specific limitations in Section 1 (48 U.S.C.A. - Sec. 21), and 9 of the Act”.

**“ . . . a Territory is not like a State in its sovereignty. It possesses only such powers as granted by the Congress of the United States.”**

Appellant argues (B-12), that, since cities are authorized to make provision for municipal elections, the authority to require registration under Ordinance No. 51 follows as a matter of course. This would be true but for the fact that such Ordinance by itself makes no provision for receiving votes of unregistered voters. When Congress has directed that every person possessing certain qualifications shall have the right to vote at any municipal election, may a city, without providing an alternative to prior registration, deny any voter his right? Appellees contend not, because Congress, by statute, has not specifically delegated such authority to the Territory or its municipalities, as was accomplished for the Territory of Hawaii.

The question whether a Territory may act in reference to a subject already legislated upon by Congress is ably discussed in the case of *Allen et al vs Reed et al*, 60 P 782. There a mandamus action was instituted to compel the county commissioners

to place the name of a certain town upon the ballot for an election submitting to the voters a proposition relating to the selection of a county seat. The Court in determining whether the action was proper, spoke as follows:

“The determination of this question involves the construction of the Organic Act, the laws of Congress and the statutes of this Territory upon the subject of the location and changing of county seats . . .”

The Court then propounded two questions, the second being:

“(2) Is it inconsistent with any law of the U. S. upon that subject?”

“It is manifest that, if Chapter 23 of the Stat. of 1893 is not a rightful subject of legislation or is inconsistent with the laws of the U.S., then the power to change the county seat, under and by virtue of said Act of the Territorial Legislature is absolutely void”.

“The grant of legislative power to this Territory is vested in Section 6 of the Organic Act, which, among other things, provides ‘that the legislative power of the Territory shall extend to all rightful subjects of legislature not inconsistent with the constitution and laws of the U. S.’”



“That Congress has plenary legislative power over the people of the Territory and all departments of Territorial government is no longer a question open to discussion . . . ’”.

In other words, the Territories are not organized under the Federal Constitution and derive no part of their legislative or judicial functions from that instrument but they are solely and exclusively the creatures of Congress”.

Hence, whenever Congress legislates upon any subject directly in relation to the government of the people of the Territory, then it ceases to be a rightful subject of Territorial of the Territory has enacted or enacts upon legislation, and any law that the legislature the same subject which Congress has assumed to legislate upon is inconsistent with such laws of the U. S. and is therefore, void”.

“And it must therefore follow that any act passed by the legislature upon the same subject is suspended and superceded until the law of Congress is modified or repealed; in other words, any law enacted by the inferior body upon the same subject must yield to the superior power”.

The court then ruled that the county seat could not be changed and writ of mandamus was denied.

(See also: *Baldrige vs Morgan et al* 106 - P.392).

In that case Congress, by statute enacted for the Territory, had adopted certain provisions concerning County government. The Territorial legislature later enacted a statute purporting also to regulate county government. The cited case is analogous to this controversy in that here we have an enactment of Congress wherein it is said that certain conditions shall prevail, and a municipal ordinance purporting to restrict such conditions, notwithstanding the absence of restrictions by Congress.

Appellees contend that since Congress enacted a statute embracing the qualifications of voters, neither the Territory nor its municipalities can restrict or deny, the right of franchise, even though the restrictions be for meritorious regulatory purposes.

Upon the authority of the *Allen* case, *supra*, it would appear that the provisions of Ordinance No. 51 are superceded by the quoted section of the act of Congress which designates the qualifications of Alaska voters. Whether registration under the ordinance be construed as a qualification or a restriction seems immaterial, for, be it either, a voter may be denied the right which he is guaranteed by Congress. Since Congress, in the exercise of its plenary legislative power, has directed that every person possessing certain qualifications - and registration is

not either a qualification or condition—shall have the right to vote at any municipal election, Ordinance No. 51 is inconsistent therewith for the reason that it imposes a restriction not found in the Congressional Act. The purpose or merit of such a restriction can not serve to sustain it where authority is lacking.

Registration, Appellees contend, would necessarily have to provide an alternative which would permit voters, not registered, to be sworn in at the polls. While Appellants contend that registration acts are universally recognized as constitutional it is significant that in most, if not all, states, registration systems the constitution or statutory law specifically provides alternatives to prior registration. Very few states unconditionally deny the right to vote upon failure to register. Ordinance No. 51, standing alone, contains no alternative and would deprive voters, otherwise qualified, of the right to vote merely because they did not register at the time and in the manner provided by law. Contentions of the Appellees are further supported by the decision of *White vs County Commissioners of Multnomah County*, 10 Pacific 484. Appellant argues that this case presents the minority view and probably quite rightfully so, speaking numerically; however, the writer believes that this case represents the correct view where neither the constitution nor statutory

law provide for the registration of voters. There, the Court said:

“as we construe the constitution, every law that cannot, under the constitution “be taken that shall require previous registration as a prerequisite to the right to vote, is ipso facto void. The legislature would have the power by implication, had it not been specifically conferred, to prescribe the manner of regulating and conducting elections; but the right to vote itself has been placed beyond their interference or control”

“The right to vote under the constitution is a vested constitutional right. ‘When I say right is vested, I mean, that he has the power to do certain actions, or to possess a certain thing according to the law of the land. Chase J., *Calder vs Bull*; 3 Dall 394. If the right still be vested by the constitution it denotes a right that cannot, under the constitution “be taken away.” Where a constitution provides, as does that of New York, that laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage the power to pass a registration law seems fully implied.” See *U. S. vs Quinn* 8 Blatchford 59.



“The case of State vs Butts 31 Kansas 554, 2 Pacific Reports 618, was founded on a like constitutional clause. **The difference between those cases and the present is the difference between a case where power has been conferred and a case where it has not**”.

In all of the cases cited by the Appellant in support of the validity of registration laws, which the writer has read, to use the words of the Oregon Court, **“the power has been conferred.”** In this case however, Appellant has failed to cite any provision of statutes emanating from Congress, or even the Territorial legislature, whereby the right to establish a registry system could be reasonably implied, and if we adhere to the fundamental theory of Territorial constitutional law, the power to adopt a registration system does not exist unless Congress has expressly delegated the necessary authority to the Territory or its municipalities.

Thus, so far as this proceeding is concerned there would appear to be considerable doubt regarding the validity of Ordinance No. 51, if construed as Appellant contends it should be.

Even if the constitutionality of Ordinance No. 51 be upheld, Appellant's contentions of error in Judge Kehoe's ruling are not sustainable since this proceeding is statutory and in the nature of a Quo



Warranto action on relation of the government. As was said in *Weaver vs Palmer Bros. Co.*, 3 Federal 2nd - 333 270 U. S. 402 "Every opinion of the Court is to be read with regard to the facts of the case, and the **question actually decided.**" The question actually decided by Judge Kehoe was whether or not this proceeding should be heard to conclusion or dismissed. In the exercise of his discretion he followed the latter course.

The Hon. Judge Kehoe in rendering his decision took into consideration not only the doubtful validity of Ordinance No. 51, but also the manner in which municipal elections had been conducted in Anchorage for many years. Voters who had not complied with the registration provisions of Ordinance No. 51 had been permitted, for approximately fifteen years, to swear in at the polls, thus adopting and giving effect to the provisions of both ordinances. This was a circumstance commonly known to all residents of Anchorage, and, at one time or another, most voters participated in the practice. Records of the City do not indicate whether such procedure arose from dereliction on the part of election officers or from an interpretation of Ordinances No. 17 and No. 51 by City officials. Whatever the source of this procedure, it seems that such practice brings this case within the following rules. In speaking of the construction placed upon a statute by an execu-

tive department, the Court in *Bloxham vs Consumers Electric Light and Street R. Co.* 36 Florida 519, 18 Southern 444 - 29 LRA 507, spoke as follows:

“The construction placed by an executive department upon a statute affecting the performance of its duties is not lightly to be questioned, especially when it has become established by long usage and relates to matters of form only. But practical construction must not be allowed to defeat the manifest purpose of the statute”.

“When in the performance of executive duties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgement; and the obligation is increased by the lapse of considerable time before its acts are called in question”.

“In such a case we think the greatest deference and respect should be paid by this court to the long prevailing construction of the statute made by the executive department of the State government, and we will not interfere with the same”.

This rule of long standing has also been adopted by the United States Supreme Court in *Brown vs U. S.* - 113 U.S. 568:

“In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect. The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons.”  
 Ahtens vs Disintegrating Co. 18 Wall 272, 301  
 - United States vs Pugh, 99 U.S. 265.

In U. S. vs George McDaniel - 32 U.S. 1, the United States Supreme Court said:

“Usage cannot alter the law, but it is evidence of the construction of it; and must be considered binding as to past transactions”.

That Judge Kehoe, in considering the allegations of Appellant's complaint properly exercised his judicial knowledge and applied the doctrine of judicial notice, is further supported by the following case:

Greeson et al vs Imperial Irrigation District et al 55 F2 321. “Judicial knowledge should be utilized by the Court as an aid to the proper interpretation of the bill of the complaint and as to the sufficiency of the allegations of fact”.

(See Jackson vs U.S. 230 U.S. 18, 57L Ed 1363)

**“An analysis and consideration of the allegations of the complaint, aided by facts which this court judicially knows, and which it has a right to consider in determining the sufficiency of the complaint under the decision of of the United States Supreme Court in Arizona vs California, 283 U. S. 423, 75 L. Ed 1154, fails to sustain Plaintiff’s contentions.”**

Judge Kehoe, as a long time resident of the Third Division, and for many years a resident of Anchorage was familiar with the practice and election procedure in the City of Anchorage, and on the authority of the above cited cases, his consideration of a construction which had long been applied to the interpretation of the Ordinances No. 17 and 51 was entirely proper. These facts which were judicially known to the court were important in determining what the exercise of his discretion would be in rendering a decision.

Appellees further contend that the election which is attacked in this proceeding was not void because of the improper observance of the provisions of Ordinance No. 51. As has been said by several courts, there is a marked distinction between registration, though it be not entirely in harmony with the letter of the law, and no registration at all. In the case of Smith vs Board of Commissioners, Skagit County,



45 Federal 725, where there was no registration at all, we find the following statement:

“Where the registration law has been disregarded, as it plainly has in this case, the election is an absolute nullity.” The Court in adopting the foregoing rule quoted from McCrary the following:

“It being conceded that the power to enact a registry law is within the power to regulate the exercise of the franchise and preserve the purity of the ballot, it follows that an election held in disregard of the provisions of a registry law must be held void.” McCrary, *Elect.* (3rd Ed.) Sec. 100.

This rule was also adopted in the case of *Fish et al vs Kugel et al*, 165 P. 299. In both of the foregoing cases, there was an entire absence of registration notwithstanding statutes requiring registration of all voters. In this proceeding there was no **complete lack of** registration and significantly there is no charge that persons not otherwise qualified voted at said election. Since there was registration part of which was in strict compliance with Ordinance No. 51 and part of which was permitted under provisions of Ordinance No. 17, this case is not within the rule of the foregoing cases.

Further consideration of Ordinance No. 51 re-



veals another uncertainty regarding the real intent of the Council that adopted it. Section 1 of the Ordinance (R 7-8) provides: “. . . and no persons shall be entitled to vote at any municipal election who are not registered according to the provisions of this Ordinance. . . .” Except for this declaration, the Ordinance is silent upon how the court shall consider votes cast by non-registered voters. Appellant argues that the votes are ipso facto illegal and the election void. Such reasoning, almost without exception, has been discarded even in jurisdictions where registration laws are construed as mandatory. Courts appear to have universally adopted a rule that elections wherein registration irregularities have occurred, will be sustained either upon the theory that election law provisions are directory when litigated after an election, or that errors upon the part of election officials, will not be allowed to void an election.

In speaking of an election where the ballots of twenty-two (22) unregistered voters had been counted, the Court in the case of Milton Cameron, Appellant, vs Dano Babcock respondent, 262 NW 80, 101 A.L.R. 650, accepted the following rule:

“The statute goes only to the extent of saying **“that no vote shall be received”**; it does not declare that after a vote has been received it shall be an illegal vote for failure to comply

therewith. We believe the rule announced by the Indiana Court in the case of *Jones vs. State ex rel Wilson*, 153 Ind. 44, 55 N.E., 229, 233, is sound wherein that Court said:

“All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void”.

Numerous jurisdictions have adopted the same rule where the acceptance of contested votes was attributed to the errors of election officials. If the acceptance of votes cast by voters not registered in strict compliance with Ordinance No. 51, be considered a dereliction upon the part of such officials, the case is brought within the rules layed down by the following cases:

In *Thompson vs Chapin*, 209 P. 1060, the court ruled:

“Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favour, and exceptions which exclude a ballot should be restricted, rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result, as shown by the ballots deposited by legal electors, must not be aside, except for causes plainly within the purview of the statute. . . The departure from the law in matters which the legislature has not declared of vital importance, must be substantial in order to violate the ballots. This appears to be the general current of all the authorities. In *Bowers vs Smith*, 111 So. 61, 20 SW 101, it is said: **“If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor, as best they may discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will.”** “The general rule layed down by this court which appears to be universally recognized is that the right of our citizens to vote at an elec-

tion cannot be defeated **because** of the failure of election officials to perform an administrative duty in the conduct of the election, specifically imposed upon such officials."

The case of: State of South Carolina ex rel. Birchmore vs State Board of Canvassers 59 S.E. 145, 14 L.R.A. (N.S.) 850, adopted the same rule in the following language:

"The universal weight of authority is to the effect that where the result of an election is not made doubtful, nor changed, irregularity or illegalities, in absence of fraud, will not cause the expressed will of the body of voters to be set aside, unless a constitutional provision is violated or it is **specifically provided by legislative enactment that such irregularity or illegality shall invalidate the election.**"

"The general principles to be drawn from the authorities are that honest mistake, or mere omissions, on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid the election, unless they affect the result, or at least render it uncertain." Election upheld.

Another case: Tagwell vs Davis - 130 P. 400, adopts the same view:

“The main purpose of the law is to prevent persons who are not qualified electors from exercising the right of suffrage. It is not the purpose of the law that a large number of qualified electors who have cast their ballots, which have been received and counted by the election judges, should be disfranchised on account of the judges of election not following the correct procedure of the law has been attained **and only qualified electors have been allowed to cast their ballots.**”

The foregoing rules are also recognized by the following cases:

Lehlback vs Haynes, 54 N.J. Law 77, 23 Atl. 422.

In re West Mahonoy Township contested election, 101 A 946.

Krickbaum's contested election, 70 Atl. 852.

State vs Arnold, 213 S.W. 834.

State ex rel Harry et al vs Ice, et al, 191 N.E. 155.

Hogins vs Bullock, 121 S.W. 1065

Jones vs State, 55 N.E. 229.

Miller vs Pennoyer, et al, 31 P. 830.

Stackpole vs. Hallahan, 37 P. 16, 19.

Lamb vs. Palmer, County Treasurer, 191 P.



184, 186.

Appellant probably will argue that the rules adopted by the foregoing cases should not be applied in this case because in the Anchorage election there was the equivalent of a complete disregard of Ordinance No. 51. Such argument would be solicitous rather than persuasive. Appellant likely will also contend that even those who voted at the special election had no right to vote at the general election unless registered. Such reasoning would not be consistent with the provisions of the ordinance sought to be sustained. Appellees have stated the approximate number of those who cast votes at both elections for the purpose of illuminating the reasons behind Judge Kehoe's decision. Technical illegality of votes is always reviewed reluctantly by Courts, and generally adversely to Appellant, unless there is a mandate in the law that violation of any provision shall render an election void. There is no such mandate in Ordinance No. 51.

Furthermore, there is no allegation that the unregistered voters were not qualified electors. The lack of such allegations would indicate all were qualified, or at least, that the number not qualified was so small that the election outcome would not have been rendered doubtful by the acceptance of their votes.

Nor does the complaint charge fraud, coercion,

intimidation or other corrupt practices upon the part of the voters or the election officials. Appellant's failure to interject issues, other than the technical legality of such votes, would render more appropriate the application of the above rules.

Appellee's objections, raised by their motion to quash, were presented in such manner because of the nature of this proceeding and of the relief sought. It is generally recognized that statutory actions, in the nature of common law *quo warranto*, are proceedings entailing **extraordinary remedies**.

Caldwell vs. Teany, et al, 157 N.E. 51, 51 C. J. Sec. 6, P. 311.

Being an extraordinary proceeding, the remedy sought is addressed to the sound discretion of the Court in which the action is filed. The Court, in its discretion, may withhold relief or decline to proceed to judgement, and it may exercise this discretion by dismissing the proceeding and rendering judgement in favor of the Defendants upon the case made by the pleadings where judgement of ouster would not be in public interest or serve any good end or purpose.

The following cases illustrate the application of this rule:

State ex rel Beck, Attorney General vs Board of County Commissioners of Allen County - 57 P. 2, 450,

was a Quo Warranto proceeding against the board because of alleged illegality of an election for failure of notice. The Court said:

“While we cannot approve the lack of official notice for the election there is presented to the Court a very vital and practical question of public interest. . . . . Under all the circumstances, would the ouster of the commissioners from the exercise of such de facto powers serve any good end or purpose. This is an original action Quo Warranto. The question is in a large measure addressed to the sound discretion of the Court.”

“This Court has recognized the principle that the judicial discretion which controls the action is broad enough to determine whether under all the circumstances the relief shall be granted.”

“The Court, while having authority to render a judgement of ouster, is not compelled to do so; there being nothing to indicate that the condition or welfare of the district could be aided thereby.”

“Even although there be departures from legal limitations and standards, **ouster does not mechanically follow**. The Court may take a broad view of motives, conduct, situations, and cir-

cumstances, and of the ultimate consequence of application of the remedy, whether useless, beneficial or harmful.”

In *Gas Service Co. vs Consolidated Gas Utilities Corp., and City of Wichita, Intervenor*, 65 P. 2, 584 at 593, we find the following:

“An action in Quo Warranto is addressed to the sound discretion of the Court as to whether the particular relief prayed for should be granted. In consideration of such a question, the Court considers all the surrounding facts and circumstances. **The relief prayed for is not always granted even though the questions of law upon which the relief prayed for depends are decided in favor of plaintiff.**”

The Court then held certain actions of the City of Wichita invalid, but denied writ of ouster .

Another case adopting the same liberal view is: *State ex rel Baird vs. Board of Commissioners of Wyandotte County* 230 P. 531. There the Court reasoned:

“Whether or not an action shall be commenced rests with the officer or persons authorized to sue. . . . .”

“When an action has been commenced, and the cause of action is before the Court for adjudication, the Court has discretion to

grant or withhold relief, and this be true whether the action be prosecuted in the name of a private person. In this respect the State comes into Court on equal terms with its citizens”.

**“Even though there be departures from legal limitations and standards ousters do not mechanically follow.** The Court may take a broad view of the motives, conduct, situations, and circumstances and the ultimate consequences of application of the remedy, whether useless, beneficial, or harmful”.

The case of: Attorney General et al vs McDonald - 129 N.W. 1056, 32LRA (NS) 835, adopts the rule in the following language:

“In the case of an alleged intrusion into office, the Court has discretion to proceed to judgment of ouster or not, as the public interest require, and judgement will not be rendered where no good end will be subserved by it”.

Citing: Lamoraux vs Ellis 89 Mich. 146, 50 NW 812.

The Court in: Attorney General ex rel vs. City of Methuen - 129 N.E. 662, 667, spoke as follows:

“The further question now arises whether the writ ought to issue under the circumstances



here disclosed, notwithstanding the violation of the constitution in the enactment of the City Charter. It was said in *Stoughton vs. Baker* 4 Mass. 232, 3 Am. Dec. 236:

No laches can be imputed to the government and against it no time runs so as to bar its rights.

“There is, however, another principle to be considered in this connection. **The granting of relief by Quo Warranto, even when sought at the instance of the Attorney General in behalf of the public, is not a matter of absolute right but is a subject for the exercise of sound judicial discretion.** It is the duty of the Court to consider all the conditions, including immediate and remote consequences and to determine with a broad vision of the public weal whether on the whole the common interests demand the issuance of this extraordinary remedy”.

See also:

*State vs. Bowden*, 101 P. 654.

*People ex rel Zimmerman et al vs. Jones et al*  
139 N.E. 403.

*People ex rel Prather et al vs. Miller et al*,  
163 N.E. 139.

People ex rel Talbot et al vs. Brinkley et al,  
152 N.E. 585.

Lamoreaux vs. Ellis, 89 Mich. 146, 50 N.W.  
812.

### CONCLUSION

Since this a satutory proceeding in the nature of a common law Quo Warranto, Appellees contend that the Honorable Judge Kehoe, by dismissing this action, did not abuse the discretion reposed in his office. That there is a question regarding the validity of Ordinance No. 51 even the Appellant ought to concede, and whether that ordinance be held constitutional or invalid is not the sole factor determining the validity of the April 1st election. The relief sought by the Government is still subject to the discretion of the Court which, in this case, was exercised in favor of the Appellees and this Court ought not to set aside the judgement of the District Court upon the sole question of the illegality of the 653 voters, there being no allegations of fraud, or other corrupt practices. The election ought to be allowed to stand in public interest, and even if Ordinance No. 51 be sustained, the judgement of the District Court should be affirmed.

Respectfully submitted,

E. L. ARNELL,

Attorney for Appellees.



No. 11708

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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UNITED STATES OF AMERICA, Appellant

vs.

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, ED-  
WARD G. BARBER, L. McGEE, CHRIS POULSEN,  
FRED MAYER, DR. F. N. (Doc) DORSEY, ROBERT  
(Bob) BAKER, and ANTON ANDERSON, Appellees

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*ON APPEAL FROM THE DISTRICT COURT FOR THE  
TERRITORY OF ALASKA, THIRD DIVISION*

---

**REPLY BRIEF FOR APPELLANT**

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**RAYMOND E. PLUMMER,**

*United States Attorney,  
Attorney for Appellant.*

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

No. 11708

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UNITED STATES OF AMERICA, Appellant

vs.

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, ED-  
WARD G. BARBER, L. McGEE, CHRIS POULSEN,  
FRED MAYER, DR. F. N. (Doc) DORSEY, ROBERT  
(Bob) BAKER, and ANTON ANDERSON, Appellees

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**REPLY BRIEF FOR APPELLANT**

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ARGUMENT

Notwithstanding the fact that there is nothing in the entire Transcript of Record, and particularly in the Minute Order Granting Motion to Quash (R. 18), the Order to Quash (R. 19), or the Oral Decision Granting Motion to Quash (R. 17-18), to indicate that the District Court decided or passed upon anything other than the constitutionality of Ordinance No. 51, Appellees boldly assert that the Court also considered the sufficiency of Appellant's complaint (B. 3). This assertion has no foundation in the record in this matter, nor does it appear from the only opinion ever

rendered by the Court (R. 17-18), that the sufficiency of Appellant's complaint was at all considered. This assertion by Appellees, together with other such assertions throughout their brief, is about as consistent with logic and good reasoning as is their statement that "both contentions were addressed to the discretion of the Court" (B. 2). The validity of Ordinance No. 51 was not a matter of judicial discretion. It was the duty of the Court to apply the well-known rules of statutory construction set forth in Appellant's Brief (pp. 38-39) and to construe Ordinance No. 51 in the light of such rules.

Appellant reiterates that the only question before this Court is whether Ordinance No. 51 is inconsistent with the provisions of 48 U.S.C.A. 57. There is no question as to whether the Common Council of the City of Anchorage had the power to pass an ordinance requiring registration of voters. The question here presented is whether an ordinance such as Ordinance No. 51, requiring registration prior to the day of election, is, for that reason, unconstitutional. This statement is not denied, but rather is admitted by Appellees in their Brief at page 8 where it is stated, "Appellant argues (B-12), that, since cities are authorized to make provision for municipal elections, the authority to require registration under Ordinance No. 51 follows as a matter of course. **This would be true but for the fact that such Ordinance by itself makes no provision for receiving votes of unregistered voters.**" (Emphasis supplied). This statement is an admission

that the Common Council had the power to enact an ordinance requiring registration but a denial that it could pass an ordinance requiring registration prior to the day of election.

The position maintained by Appellant and admitted by Appellees is well stated in somewhat different words in McCrary on Elections, Fourth Edition, Section 132, page 100, as follows:

"But it is to be observed that the Constitution of no State defines the character of the registration law which may be enacted, or provides that registration prior to the day of election may or not be required. It is believed that no case goes so far as to deny the power of the Legislature of a State to pass a registration act, when the Constitution is silent upon the subject. This being so, the question we are considering is not affected by the presence or absence of a constitutional provision authorizing the Legislature to pass such an act. **The power exists in either case, and in either case the question must be the same, viz.: whether the act when passed merely regulates the exercise of the right to vote, or goes further and impairs it.**" (Emphasis supplied).

The primary purpose of registration laws is to prevent intimidation, fraud, bribery and other corrupt practices by providing in advance of the election an authentic list of legal voters. To adopt the position asserted by Appellees, that the registration act must contain a provision for receiving votes of unregistered



voters, would be to nullify and destroy the primary purpose of registration laws.

That Ordinance No. 51 establishes a reasonable and valid system of regulation is adequately shown by the cases cited in Appellant's Brief, pages 20 to 37 inclusive, which reflect the overwhelming weight of authority. If any person's right of franchise is restricted in any manner it is not by virtue of the provisions of Ordinance No. 51, but rather is attributable to such person's own indifference or carelessness. In an opinion by the Supreme Court of the State of Utah in the case of **Earl v. Lewis**, 28 Utah 127, 77 Pac. 238, the Court stated:

"While the right of a person having the constitutional qualifications of a voter cannot be impaired, either by the Legislature or the malfeasance or misfeasance of a ministerial officer, the voter himself may waive the exercise of the right, and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, **or neglects to properly apply for registration.**" (Emphasis supplied).

Appellees then attempt to bolster and explain the decision of the District Court not upon the basis of any fact or matter appearing in the record, but by asserting that the Court took judicial notice of certain matters and that the Court exercised its discretion in dismissing the case. Appellees seek to have this Court determine the case on its merits, a thing which they very carefully avoided in the District Court.

Appellees in their brief have confused the term

"judicial notice" with "personal knowledge." They have overlooked the principle that the Judge is not to use from the bench, under the guise of judicial knowledge, that which he may know only as an individual observer outside of Court. In Wigmore on Evidence, Volume IX, Section 2580, pp. 576-577, quoting from the case of **Varcoe v. Lee**, 180 Cal. 338, 181 Pac. 223, pertaining to the doctrine of judicial notice, it is stated:

"The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence."

In Wigmore on Evidence, Volume IX, Section 2568, page 536, it is stated:

"Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it. Upon this request, the Court

is bound, it is sometime said, to declare the fact noticed, or at least to make that investigation which it deems necessary."

In the case at bar Appellees did not request the Court to take judicial notice of such matters, nor does it appear other than by Appellees' assertions that such matters were of such a nature that they could have been judicially noticed by the Court.

It is inconceivable that Appellees are serious in their contention that the Court actually decided the case on its merits or exercised its discretion without having heard any of the facts of the case. A hearing on the merits has been the one thing which Appellant has sought since the date of the filing of the complaint in this action. There were no facts before the District Court, nor are there facts before this Court, which would enable either Court to exercise its discretion and determine whether or not as a matter of public interest this case should be prosecuted or dismissed.

It is granted that Appellees' statements to the effect that in quo warranto proceedings the Court, in its discretion, may withhold relief or decline to proceed to judgment and that it may exercise its discretion by dismissing the proceeding and rendering judgment in favor of the defendants on the case made by the pleadings if it appears that such judgment of ouster would not be of public interest or serve any good or purpose, is a partial recitation of the matter set forth in 51 Corpus Juris, Section 34, page 332, and is prob-

ably correct as a general statement of the law. However, it is to be noted that it is stated that judgment may be rendered on the "pleadings," using the plural. It does not state that a judgment of dismissal can be entered solely on the basis of the plaintiff's complaint. Nor have Appellees cited any case which stands for such proposition. In the cases cited by Appellees the Court has in some exercised its discretion on the basis of the pleadings, that is, the petition or complaint, the answer, the reply or replication, and in others the Court has exercised such discretion after a full hearing on the merits. However, in no case cited by Appellees or known to Appellant has the Court claimed to have exercised its discretion based solely upon the complaint in the absence of other pleadings or in the absence of a hearing on the facts of the case.

Appellees then ask the Court to sustain the judgment of the District Court because there is no allegation of fraud, corrupt practices, or that the result of the election would be changed and state that the election ought, therefore, to be allowed to stand in the public interest.

This being an action in the nature of a proceeding in quo warranto, Appellant concedes that under the laws of Alaska the Court would have no authority to declare the election held on April 1, 1947, void. The action is a demand upon the Appellees to show by what right they exercise the functions of the offices into which they have intruded. Therefore, the question to ultimately be determined by the District Court



is not whether the election of April 1st is or is not void, but whether the Appellees have legal title to such offices. In determining the title to such offices the Court is not bound by the certificates of election which were issued but may look beyond such certificates. (**People v. Pease**, 84 Am. Dec. 242, and **People ex rel Judson v. Thacher**, 14 Am. Rep. 312). The fact that the Court was requested to declare the election to be void in the prayer of the complaint filed herein is immaterial and may be disregarded. (Ferris, Extraordinary Legal Remedies, Section 129, page 150; **State ex rel Major v. Mo. Pac. Railway Co.**, 240 Mo. 35, 145 S.W. 1088.)

In a quo warranto proceeding brought by the state on the relation of the prosecuting attorney merely to oust the possessor of an office, respondent's right to hold the office depends upon the strength or validity of his own title, and not upon any infirmity in the title of another person. The state is bound to make no showing and defendant must make out an undoubted case. He must set out his title specifically and show on the face of the answer that he has valid title. The people are not called upon to show anything. The entire burden is on the defendant.

51 Corpus Juris, Sec. 75, p. 355, and cases cited in note 65

**State v. Kupferle**, 100 Am. Dec. 265

**People ex rel Judson v. Thacher**, 14 Am. Rep. 312

Ordinance No. 51 states in part, "no persons shall



be entitled to vote at any municipal election who is not registered according to the provisions of this Ordinance." (R. 8).

In 101 A. L. R. page 658, we find the following statement under the heading "Mandatory provisions generally":

"Under statutory, as well as constitutional, provisions requiring qualified voters to be registered before being permitted to vote, which have generally been regarded as mandatory provisions,—the essential substance of the provisions of the various statutes being indicated or suggested in connection with the individual cases,—the courts have as a rule held that votes which election officials have permitted to be cast without compliance with the requirement of registration are illegal and not to be counted; this being, of course, particularly so where the provisions expressly prohibit the counting of such votes **or declare that those who are not registered shall not vote.**" (Emphasis supplied.)

The following cases were cited:

**Falltrick v. Sullivan** (1898) 119 Cal. 613, 51 P. 947

**Briscoe v. Between Consol. School Dist.** (1931) 171 Ga. 820, 156 S.E. 654

**Jaycox v. Varnum** (1924) 39 Idaho, 78, 226 P. 285

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**Esker v. McCoy** (1878) 5 Ohio Dec. Reprint, 573, 6 Am. L. Rec. 694

**King v. State** (1924) 96 Okla. 297, 222 P. 960

**Wright v. State Canvassers** (1907) 76 S.C. 574, 56 S.E. 536

**State ex rel. Hyland v. Peter**, (1899) 21 Wash. 243, 57 P. 814

In cases involving election contests, as distinguished from actions in the nature of quo warranto, it is generally stated that while it is well settled that where enough illegal votes are cast at an election to change the result or leave it in doubt the election is void. Yet, it is equally well settled that the result of an election will not be disturbed because of illegal votes received unless the aggregate of such votes would change the results. Vol. 29, C.J.S., Elections, Section 219, page 322.

In the present case the number of illegal votes was 653. On pages 6 and 7 of Appellant's Brief the tabulated results of the election are shown. Candidates McGee, Poulsen and Mayer were declared to be elected by votes less in number than the number of illegal votes cast. As between candidate McGee and candidate William H. (Bill) Olson a difference of two votes would have entirely changed the result of the election.

In McCrary on Elections, 4th Edition, Section 396, page 295, it is stated:

"In **Ex parte Murphy**, 7 Cowen 153, it was held that the mere circumstance that improper votes were received at an election will not

vitiate it. In that case, one candidate had received a majority of two votes, and it was charged that two illegal votes were cast, but there was no allegation that they were cast for the candidate having the majority. The motion for quo warranto was denied, the Court saying, 'For all that appears the spurious ballots were for the ticket which was in the minority.' This ruling, however, should be explained and probably qualified. If it goes no further than to hold that the information in that particular case was insufficient to warrant the allowance of a quo warranto, it may be accepted as correct, but, if it is construed as asserting the doctrine, that in all cases it is necessary to show that the person declared elected was, in fact, defeated, before the election can be set aside, then it goes too far. An election may be set aside, declared void, and a new election be ordered, upon the introduction of such proof as renders it impossible to determine who has been chosen by a fair majority, but the contestant can, in no case, be declared entitled to the office until he shows, affirmatively, that he has received a majority of the legal votes cast."

Should the District Court subsequently, upon considering the sufficiency of the pleadings to be filed by Appellant, determine that the allegation of the reception of 653 illegal votes is not sufficient to constitute a cause of action in quo warranto, Appellant stands ready to allege by way of reply, and to prove, that a sufficient number of the 653 illegal votes were fraudulently cast by persons not qualified to vote to have

changed the result of the election.

### CONCLUSION

The issue before this Court and the only issue determined by the District Court is the constitutionality of Ordinance No. 51. The District Court did not pass upon the sufficiency of Appellant's complaint nor upon the validity of the April 1st election. This Court is not now in a position to render a decision upon the merits solely upon the basis of the Transcript of Record. Appellant is entitled to its day in Court and a hearing on the merits. The validity of Ordinance No. 51 should be upheld, the judgment of the District Court should be reversed and the cause remanded in order that a hearing on the merits may be had at the earliest possible date.

Respectfully submitted.

RAYMOND E. PLUMMER,

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No. 11710.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

EVERETT H. CALLAN,

*Appellant,*

*vs.*

FLOYD COPE and ARTHUR AUSTIN,

*Appellees.*

---

APPELLANT'S OPENING BRIEF.

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EVERETT H. CALLAN,

*Appellant,*

*vs.*

FLOYD COPE and ARTHUR AUSTIN,

*Appellees.*

---

APPELLANT'S OPENING BRIEF.

---

**Jurisdictional Statement.**

This is an appeal in Admiralty from a final decree of dismissal entered in the United States District Court for the Southern District of California, Central Division, in an action for damages under the Jones Act (46 U. S. C. A. 688), and for maintenance and cure. Appellant sustained serious injuries October 16, 1944, on the fishing boat, "Atlas," at Newport Beach, California, when it blew up while taking on gasoline.

The pleadings in the District Court were a libel for damages, maintenance and cure [Ap. 3]; answer of respondent Floyd Cope [Ap. 8]; petition to bring in third party [Ap. 15]; and order impleading third party. [Ap. 18.]

A citation was issued and served on respondent Arthur Austin, but the Court tried the case prior to the date upon which this respondent was required to appear. [Ap. 19.]

A trial was had before the United States District Court with the Honorable J. F. T. O'Connor, Judge, presiding. However, when the libelant rested, a motion for a non-suit was made upon behalf of respondent Floyd Cope. The Court granted the Motion and made it applicable to both of the respondents, one of whom had not appeared, and who still has not appeared in this action.

Findings of fact and conclusions of law were served on the office of counsel for libelant on January 17, 1947, but contained no provision therein, nor were approved as to form as required under local rule 7a of the United States District Court for the Southern District of California. Notwithstanding the prohibition contained in local rule 7a, the Court signed both findings of fact and conclusions of law and the final decree of dismissal on January 20, 1947 [Ap. 114, 117], prior to the time the libelant had within which to serve and file his objections to and proposed amendments to the findings of fact and conclusions of law. Libelant served and filed his objections to and proposed amendments to the findings of fact and conclusions of law on January 21, 1947, within the five day period as provided in local rule 7a. [Ap. 108.]

The apostles on appeal, certified by the clerk of the District Court, include the following: petition for order allowing appeal without bond and points and authorities [Ap. 119], order allowing appeal without furnishing bond or costs [Ap. 121], assignment of errors [Ap. 122], notice of appeal [Ap. 128], and praecipe. [Ap. 129.]



The jurisdiction of the District Court over actions, civil and maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; Stat. L. 76, 78; 28 U. S. C. A. Section 371.

Appeals from final decrees in Admiralty are authorized by Section 128a of the judicial code, as amended May 9, 1942, (56 Stat. L. 272, 28 U. S. C. A. Section 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

### **Statement of the Case.**

On October 16, 1944, at Newport Beach, California, the appellant was employed as a seaman and fisherman on the Gas Screw "Atlas." [Ap. 40, 41, 42.] At that time, the respondent Cope, having suffered a broken arm earlier that day, had respondent Austin signed on as Master thereof on October 17, 1944, at San Pedro, California. [Ap. 30, 31.] On the night of October 18th, the "Atlas" went out with Callan, Cope and Austin all aboard.

Appellant Callan went aboard the "Atlas" about four (4) o'clock on the afternoon of October 18, 1944. Appellee Austin was already aboard. The lines were cast off by Callan and Austin operated the boat across the channel

to the General Petroleum dock to take on gasoline and bait. [Ap. 45, 47, 48.] Callan was given the gasoline hose by the attendant ashore and proceeded to fill the tanks [Ap. 46]; Austin kept the engines running at all times. [Ap. 48.] Before the second tank was filled, there was an explosion aboard and Callan was seriously injured. As a result of the injuries so sustained, he was hospitalized and a brain operation was performed. Thereafter, there was a long period of disability. Neither the costs of his hospitalization, physicians nor maintenance were paid by either of the appellees.

From the evidence, the District Court concluded that the libelant was not entitled to recover the costs of hospitalization, physicians and maintenance from either of the respondents. The Court further held that the libelant was not entitled to recover damages for the injuries sustained as a result of the explosion and gave a judgment of dismissal as to both respondents.

### **Assignment of Errors.**

The assignment of errors upon which the appellant relies are set forth in the appendix to this brief, and are summarized in the following statement of points involved in this appeal:

a. Is libelant entitled to recover his maintenance and cure for an injury admittedly sustained in the course of his employment as a seaman aboard the Gas Screw "Atlas"?

b. Is libelant entitled to recover damages for injuries sustained by him either through the failure of his employers to furnish him a safe place to work, negligence in the operation of the vessel, or unseaworthiness?

c. Was there a complete demise of the vessel so that respondent Cope did not remain either as the employer or co-employer of the libelant?

d. Did the District Court err in trying this action before it was at issue as to all respondents?

e. Did the District Court err in favorably entertaining a motion of nonsuit?

f. Is the District Court in error in assuming that exceptions are saved to a litigant in Admiralty without his requesting the same?

### Outline of Argument.

I. This appeal is a trial *de novo*.

II. Libelant is entitled to recover the cost of his cure and his maintenance for the full period of his disability.

III. Libelant was employed by both appellants Cope and Austin.

IV. Is libelant entitled to recover damages for the injuries sustained by him through the explosion on October 16, 1944?

V. A motion for a nonsuit does not lie in Admiralty and the federal rules of civil procedure in regard to nonsuit are not applicable to an action in Admiralty.

VI. The District Court is in error in assuming that exceptions in an action in Admiralty are saved without being requested.

## ARGUMENT.

### I.

**This Appeal Is a Trial de Novo. No Authority Is Necessary to Establish This Point in the Ninth Circuit.**

### II.

**Libelant Is Entitled to Recover the Cost of His Cure and His Maintenance for the Full Period of His Disability.**

It has been well recognized for over a century in this country that the obligation of a shipowner or operator which is owed to a seaman for his maintenance and cure is contractual in its nature, being a part of the contract for wages and a material increment in the compensation for his labor and services.

*Hardin v. Gordon*, 2 Mason 541, 11 Fed. Cases 480, 481, Case No. 6047 (Cir. Ct., Dist. Mass., 1823),—"the classic passage by Mr. Justice Story," said the late Mr. Chief Justice Stone in—*Calmar SS Corp. v. Taylor*, 303 U. S. 525, 527 (1937);

*Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371 (1932);

*Pacific SS Co. v. Peterson*, 278 U. S. 130, 135 (1928).

The appellant was immediately hospitalized after his injury, incurring a hospital bill of \$165.39; doctors' bills in a substantial sum, not appearing in the portion of the transcript before the Court; and paid for his own maintenance during the period of his disability which was approximately five months. There is no question but that the appellant was employed upon the Gas Screw "Atlas" and that he received injuries while engaged thereon.

III.

**Libelant Was Employed by Both Appellants Cope and Austin.**

The evidence is without contradiction that the appellant was employed upon the 14th day of October, 1944, and at that time respondent Cope was the owner and the master of the Gas Screw "Atlas." [Ap. 39-42.]

IV.

**Is Libelant Entitled to Recover Damages for the Injuries Sustained by Him Through the Explosion on October 16, 1944?**

There is no question as to the fact of the explosion aboard the Gas Screw "Atlas" on October 18, 1944. The respondent Austin was in the exclusive possession of the vessel at the specific moment of the explosion. Likewise, he maintained the engines of the "Atlas" in operation, notwithstanding the fact they were loading gasoline. [Ap. 45-49.]

The explosion in the case at bar is an event that does not happen in the use of ordinary care.

The latest expression of the United States Supreme Court on the doctrine of *res ipsa loquitur* is found in the case of *Jesionowski v. Boston & Maine R. R.*, 67 S. Ct. 404 (1947). Appellant did not assume any risk of proceeding with the loading of the gasoline at the time, in view of the fact that he was under orders to do the same. Even though the Court may take the position that the danger was obvious, it is not a defense to this action.

*Beadle v. Spencer*, 298 U. S. 124, 50 S. Ct. 712;  
80 L. Ed. 1082;



*Le Jeune v. General Petroleum Corp.*, 128 Cal. App. 404;

*Hanson v. Luckenbach S. S. Co.*, 65 F. (2d) 457 (C. C. A. 2).

The recent decision of the New York Supreme Court in the case of *Boylan v. Southern Pacific Company*, 1937 A. M. C. 137, the Court held that a seaman does not, under the Jones Act, assume the risk of defective appliances and of an unsafe place to work.

Also, in *U. S. v. Boykin*, 49 F. (2d) 762 (C. C. A., Fla. 1931), the seaman did not assume the risk of an obvious danger when acting under the direct orders of his superior. It is well settled that a seaman does not assume the risk of an unsafe place to work. It is undisputable that the circumstances in the case at bar created an unsafe place to work through the maintenance of running engines at a time when gasoline was being loaded. The respondents had exclusive control of the vessel and the operation of its engines and they could not possibly have discharged the duty that was upon them of showing proper care or supervision of the loading of the gasoline when the accident happened. Proper supervision would have dictated the cutting off of the ship's engines during this operation.

There was no assumption of risk on the part of libellant in working under such conditions, of course. (*Arizona v. Anelich*, 298 U. S. 110 (1938).)

It is reasonably certain that the District Court completely overlooked the factor of reasonable care and super-

vision which would have prevented the happening of this accident.

*The Meton*, 62 F. (2d) 825 (C. C. A. 5, 1923);  
*Fauntleroy v. Argonaut S. S. Line*, 27 F. (2d) 50  
(C. C. A. 4, 1928).

Then too, it may be that the maintenance of the ship's engines in operation while gasoline was being loaded constituted unseaworthiness.

*Mahnich v. Southern Steamship Company*, 321 U. S. 96, 88 L. Ed. 561;  
*The Osceola*, 189 U. S. 175, 47 L. Ed. 764.

It seems conclusive that the doctrine of *res ipsa loquitur* is applicable and that the respondents negligently failed to supply the appellant with a safe place to work or, their action in the manner in which they permitted the gasoline to be loaded constituted unseaworthiness.

## V.

### **A Motion for a Nonsuit Does Not Lie in Admiralty and the Federal Rules of Civil Procedure in Regard to Nonsuit Is Not Applicable to an Action in Admiralty.**

Rule 16 of federal rules of civil procedure has no applicability to the entertainment of a motion for a nonsuit, especially when the case is not at issue as to one of the respondents. No stronger argument can be made than to state that Rule 16 means just what it says. It refers to pretrial procedure.

The inapplicability of this rule is further apparent by reason of the fact that respondent Austin had not yet

filed his answer so that it was impossible to form the issues as to him at the date of this trial.

The record in this case will show that respondent Arthur Austin had to and including the 13th day of January, 1946, within which to answer the libel. [Ap. 19.] The case was forced to trial on January 7, 1947, in spite of objections raised by counsel for libelant and respondent Cope. [Ap. 22, 23.]

The forcing of cases to trial before they are at issue and before depositions can be taken is a practice that should be either condemned or approved by our United States Circuit Court of Appeals.

## VI.

### **The District Court Is in Error in Assuming the Exceptions in an Action in Admiralty Are Saved Without Being Requested.**

Have the rules of Admiralty been changed to the extent that it is no longer necessary for a party to request an exception in order to save such exception on appeal? The writer of this brief has been unable to find any case that supports the contention of the trial judge in his statement that, "You have an exception to every ruling of the Court according to the rules of the Court." [Ap. 66], and, "You have an exception without making it." [Ap. 73.]

The writer of this brief has reviewed the rules of the United States District Court of the Southern District of California, and finds no such provision contained there-

in. The point involved is a subject of considerable embarrassment to counsel in the trial of Admiralty cases and should be clarified by this Honorable Court.

**Conclusion.**

It is respectfully submitted that the judgment of the United States District Court in this case be reversed and that this Honorable Court make its decree upon the issues presented herein.

Respectfully submitted,

LEONARD DIMICELI,

DAVID A. FALL,

*Proctors for Appellant.*









## APPENDIX.

### Assignment of Errors.

#### I.

The District Court erred in finding that "each and all of the allegations of paragraph Second of the Libel are untrue, except, that it is true that an explosion occurred on the vessel "Atlas" on the 18th day of October, 1944, at Newport Beach, California, and that libelant as a result thereof sustained personal injuries."

#### II.

That the District Court erred in not finding that on or about the 18th day of October, 1944, when the said gas screw "Atlas" was at Newport Beach, California, taking on gasoline, the Master of the said "Atlas" so negligently and carelessly permitted and did maintain the engine of said vessel in operation, so that the same caused the gasoline being taken aboard to explode, forcibly throwing libelant through the cabin of said vessel into the waters of Newport Beach Harbor, inflicting upon him the following injuries: depressed compound fracture of the skull, concussion of the brain, laceration of the scalp, contusions and abrasions of his face and entire body and water in his lungs."

#### III.

That the District Court erred in finding that at all times during libelant's employment on the vessel "Atlas," that the exclusive possession, command and control of navigation of said vessel was vested in Earl Austin by virtue of an oral bareboat charter thereof made and executed between respondents Floyd Cope and Earl Austin on October 16, 1944.

IV.

That the District Court erred in finding that the term of said bareboat charter began on October 16, 1944, and extended to the end of the mackerel fishing season which season ended in February, 1945.

V.

That the District Court erred in not finding that Floyd Cope and Earl Austin were the employers of the libelant.

VI.

That the District Court erred in not taking specific findings on the nature and extent of libelant's injuries, the medical care and services necessitated thereby, the nature and extent of the libelant's disability, maintenance and cure, and on all other damages sustained by libelant.

VII.

That the District Court erred in finding that it is not true that respondents or either of them were negligent.

VIII.

That the District Court erred in finding that there was not at any time any contractual or other relationship between respondent Floyd Cope and libelant.

IX

That the District Court erred in finding in its paragraph VII of Findings "Except as specifically hereinabove found all of the allegations of the libel are untrue, and all of the allegations of the Answer of Floyd Cope are true."

X.

That the District Court erred in not finding that libelant incurred for his cure for the injuries sustained while employed on the "Atlas," the sum of \$785.44 for his cure.

XI.

That the District Court erred in not finding that libelant was entitled to recover from respondents and each of them the sum of \$497.00 for his maintenance during his disability the result of his injuries sustained while employed on the "Atlas."

XII.

That the District Court erred in not finding that libelant sustained general damages in the sum of \$35,000.00.

XIII.

That the District Court erred in not finding that respondent Arthur Austin was the Master of the vessel "Atlas" from and after the 17th day of October, 1944.

XIV.

That the District Court erred in not finding that it is true that respondent Floyd Cope was, at all times mentioned in the libel, the owner of the vessel "Atlas" and that on the 16th day of October, 1944, the said Floyd Cope was the owner, operator and Master of said vessel, and that at all times on and after the 17th day of October, 1944, during the libelant's employment on the vessel "Atlas," the exclusive possession, command and control and navigation of said vessel was vested in Arthur Austin by virtue of an oral demise and charter thereof, and that said charter became effective on the 17th day of October, 1944, the day upon which respondent Arthur Austin was signed on as Master of said vessel.

XV.

That the District Court erred in not finding that libelant received a depressed comminuted compound fracture of the skull and suffered contusions and abrasions about his



face and body, suffered submersion in an unconscious state necessitating resuscitation, adhesions between the temporal muscle and the dura causing traction of the dura, and that the skull fracture is permanent; and that said injury necessitated expert brain and skull surgery and hospitalization from the 18th day of October, 1944, to the 28th day of October, 1944.

#### XVI.

That the District Court erred in not finding that libelant was totally disabled from the 18th day of October 1944, to and including the 18th day of April 1945; and that during said time after the 28th day of October 1945 incurred lodging expense in the sum of \$47.00 per month and expense for his food in the sum of \$2.75 per day.

#### XVII.

That the District Court erred in making any finding with regard to respondent Arthur Austin as the case was not at issue at the time of the trial as to this respondent.

#### XVIII.

That the District Court erred in trying the case as between libelant and respondent Arthur Austin, as said respondent Arthur Austin had not appeared in said case at the time of trial and that said case was not at issue as to this respondent at the time of trial, and that said respondent had until January 13, 1947 within which to plead to the libel of this libelant.

#### XIX.

That the District Court erred in signing the Findings of Fact and Conclusions of Law and the Final Decree on the 20th day of January 1947.

XX.

That the District Court erred in not abiding by Local Rule Seven and Local Admiralty Rule 139 of the Southern District of California of the United States District Court.

XXI.

That the District Court erred in not ruling upon the objections to the Findings of Fact and Conclusions of Law and Final Decree presented to the said District Court on the 21st day of January, 1947.

XXII.

That the District Court erred in entertaining a Motion for a Nonsuit in Admiralty.

XXIII.

That the District Court erred in granting a nonsuit in this matter.

XXIV.

That the District Court erred in not decreeing that libelant was entitled to recover his damages, maintenance and cure from both respondents.



No. 11710  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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EVERETT H. CALLAN,

*Appellant,*

*vs.*

FLOYD COPE and ARTHUR AUSTIN,

*Appellees.*

---

APPELLEES' REPLY BRIEF.

---

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*Appellees.*

---

**APPELLEES' REPLY BRIEF.**

---

**Statement of the Case.**

The facts of this case, insofar as they appear to appellees to be relevant to this appeal, are as follows:

On October 16, 1944, at Newport Beach, California, appellant was employed as a seaman and fisherman on the Gas Screw "Atlas" [Ap. 40, 41, 42, 80]. On that date, but prior to the employment of appellant, appellee Floyd Cope, hereinafter referred to as "Cope," the owner of the said "Atlas," had by oral agreement effected a bareboat charter of said vessel to appellee Arthur Austin, hereinafter referred to as "Austin," under the terms of which the exclusive management, use, and control of the vessel in every respect vested in Austin [Ap. 78-81, 26-30, 35-36, 57]. Appellant requested employment from Cope, but was told that Austin had leased the

vessel and appellant would have to ask him [Ap. 25, 77]. Cope thereupon introduced appellant to Austin and Austin hired him [Ap. 77, 79-80]. Thereafter on October 18, 1944, an explosion, the exact cause of which has never been explained, occurred on the vessel as a result of which appellant was injured [Ap. 45-49, 61-72, 82-89]. The time said explosion occurred the vessel was taking on gasoline [Ap. 45-49, 61-72, 82-89]. The gasoline hose was held and the nozzle controlling the flow of gasoline was operated by appellant [Ap. 65, 67-69]. Austin ordered appellant not to start fueling until the engines had been cut off [Ap. 83]. Appellant nevertheless proceeded to fuel the vessel [Ap. 65, 67-69]. Austin was out of sight when this occurred [Ap. 83-84].

As a result of the explosion and appellant's consequent injuries, appellant suffered amnesia which, according to appellant's medical expert, could have substantially impaired his ability to remember incidents which preceded the explosion [Ap. 50-52].

Prior to bringing the action against appellees herein, appellant brought an action against the General Petroleum Company in the Superior Court of the State of California, in and for the County of Los Angeles, wherein he alleged that the injuries he suffered were caused by the negligence of the General Petroleum Company [Ap. 68-72].

Upon the evidence presented by appellant the District Court dismissed the libel against both respondents upon both counts.

### Argument.

Appellees in reply to the matters set forth by appellant in his opening brief believe that the questions before this Honorable Court are as follows:

I. Is libelant, in view of the evidence, entitled to recover from Cope for maintenance and cure?

II. Is libelant, in view of the evidence, entitled to recover from Austin for maintenance and cure?

III. Has libelant established a case under the Jones Act (46 U. S. C. A. 688) for recovery of damages against Cope?

IV. Has libelant established a case under the Jones Act (46 U. S. C. A. 688) for recovery of damages against Austin?

V. Was the action of the District Court in decreeing a dismissal after appellant had rested proper?

The above points have been discussed by appellant in his opening brief together with a reference to the matter of this appeal being a trial *de novo* and an alleged error of the District Court in assuming that exceptions in Admiralty actions are saved without being requested.

The latter two questions can be disposed of briefly at this point, the other matters being reserved for discussion under appropriate headings hereafter.

We cannot quarrel with the proposition that this appeal is a trial *de novo*. The rule is well established. But it is equally well established "that findings of fact reached



upon conflicting testimony and based upon the credibility of witnesses whom the District Court saw and heard will not be reversed, unless error is clear,”

*Benedict on Admiralty*, Vol. 4, page 61, *et seq.*,

and it is “elementary that weight of evidence on issue determined by trial judge is not to be reviewed.”

*Barlow v. Pan-Atlantic SS. Co.*, 101 F. (2d) 697.

As to appellant’s discussion with respect to the District Court’s alleged error in assuming that appellant’s exceptions were saved, appellees can merely state that such error, if any, did not in any way prejudice appellant, since appellees have not and are not taking the position that appellant has waived any right to assert the error of any rulings made by the District Court upon appellant’s objections to any evidence introduced.

## I.

### **The Libelant Is Not Entitled to Recover Maintenance and Cure From Cope Because Cope Was Not His Employer.**

The right of a seaman to maintenance and cure is regarded as being a right which springs from his contract of hire. It thus depends upon the existence of a contract wherein an employee-employer relationship is established. Where this relationship does not exist there can be no recovery for maintenance and cure by the injured seaman.

*Hardin v. Gordon*, 2 Mason 541, 11 Fed. Cas. 480;

*Cortis v. Baltimore Insular Line* (1932), 28 U. S. 371.

Where the true owner has parted completely with the management and control of the vessel as by a bareboat charter, the charterer becomes the owner *pro hac vice* and the crew members become employees of the charterer and not of the original owner and hence, since the right to maintenance and cure stems from the agreement of employment, the employer or charterer would be the one to whom the seaman must turn for relief.

*The Carrier Dove* (1899), 97 Fed. 111, at p. 112;  
*Cromwell v. Slaney* (1933), 65 F. (2d) 940.

Appellant's choice of authority and the language of his argument would indicate that he agrees with this principle (App. Br. p. 6).

Nor can liability be imputed to the true owner because of any agency principle since under a bareboat charter the master of a vessel is not regarded as the agent of the owner of the vessel during the life of the charter party.

*Baccarat v. Mahoney Co.* (1931), 4 Fed. Supp. 611;

*The Duchess*, 16 F. (2d) 1003.

A review of the evidence will show that the District Court was correct in finding that there was complete demise of the vessel from Cope to Austin and that there was no contractual relationship between Appellee Cope and Appellant [Ap. 57, 77-82, 24-32, 35-36].

Under such circumstances recovery for maintenance and cure could not be had against Cope.

II.

**Libelant Is Not Entitled to Recover Maintenance and Cure From Either Austin or Cope Because of Libelant's Improper Conduct.**

Although a seaman may not be barred from his right to recovery of maintenance and cure because of his contributory negligence, recovery will not be allowed to him where his injury was caused by his own wilful or gross misconduct. This rule is as ancient as the rule providing for maintenance and cure itself.

“The expenses of curing himself of any illness or injury occasioned by his own improper conduct are thrown upon the seaman by the Laws of Oleron, Art. 6.”

4 L. R. A. (N. S.), p. 72;

48 American Jurisprudence, p. 117.

Wilful disobedience of orders, such as in this case, constitutes such misconduct as qualified the right of a seaman to maintenance and cure.

*The City of Carlisle*, 39 Fed. 807, at p. 813.

We submit that the District Court properly found that the actions of appellant in loading gasoline while the engine was running amounted to gross misconduct on his part particularly in view of the fact that appellant owned a vessel and knew of the extreme danger of such a situation [Ap. 65-67], knew where the controls were and had ready access to them [Ap. 63], and in wilful disobedience

of the master's specific order [Ap. 83] recklessly continued his course of conduct. If the explosion was caused by the taking on of the gasoline under these circumstances, as appellant contends, appellant caused it and no act or failure to act on the part of appellees contributed to it.

### III.

#### **Libelant Cannot Recover Damages Under the Jones Act Against Cope Until He Has Established an Employer-Employee Relationship.**

"The Jones Act and the Employers' (Railway) Liability Act which it incorporates by reference are specifically drawn to give rights to employees against employers and against no others."

*Benedict on Admiralty*, Vol. 5, p. 202;

*Eggleston v. Republic Steel Corp.* (1942), 47 F. Supp. 658.

Where a vessel has been chartered and the true owner has parted with the possession, use, control and operation of the vessel the seaman does not have his cause of action under the Jones Act against the owner although he may have against the charterer.

*Baccarat v. Andrew Mahoney Co.* (1938), 4 F. Supp. 611;

*Gardiner v. Agwilines* (1939), 29 F. Supp. 348.

Appellees have reviewed the evidence in connection with Point I *supra* and the same circumstances apply here.

IV.

**Libelant Cannot Recover Damages Under the Jones Act Either Against Austin or Cope Because No Negligence on the Part of Appellees Was Proved.**

Unlike an action for maintenance and cure the “gravamen of a Jones Act suit is negligence.”

*Benedict on Admiralty*, Vol. 1, p. 50, citing;

*The Princess Matoika*, (1925), A. M. C. 1547;

*The Cioca* (1925), 7 F. (2d) 676;

*The Rawleigh Wainer* (1937), 88 F. (2d) 298.

There is nothing in the record to show how the explosion occurred. Much evidence was produced with respect to the taking on of gasoline while the vessel's engine was in operation but no evidence whatsoever was brought forth which showed that the explosion was caused by this. Appellant in his libel specifically set forth that the taking on of gasoline with the engine running was a negligent act on the part of appellees and his position in this regard is reiterated by his stipulation [Ap. 97-98] that this is the *only* act complained of. The record shows absolutely no evidence that (1) the explosion was caused by this act or that (2) the maintenance of the running engine was a negligent act on the part of appellees.

Appellant seeks to avoid the necessity to prove negligence by asserting that the doctrine of *res ipsa loquitur* applies (App. Br. p. 7).



Appellees reply to this assertion by stating that the doctrine of *res ipsa loquitur* is fundamentally grounded on the principle that "the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it and that plaintiff has no such knowledge."

38 American Jurisprudence, p. 995.

This situation does not apply here for appellant has asserted in his libel that he knew what caused the injury [Ap. 3-4, 97-98]. He cannot now because he has failed to prove his assertion cast the obligation upon appellees to explain what happened. If he shows some knowledge of what happened the reason for the rule ceases and correspondingly the rule ceases.

*Shaine, "Res Ipsa Loquitur,"* p. 483;

*Connor v. A. T. and Santa Fe. Railway Co.*, 189 Cal. 1.

Appellees further submit in this regard that in order for the doctrine of *res ipsa loquitur* to apply, it must appear that the instrumentality which produced the injury complained of was at the time of the injury under the exclusive management or control of the defendant or of his agents and servants.

38 American Jurisprudence, p. 996;

*Cruse v. Sabine Transp. Co.* (1937), 88 F. (2d) 298.

If, as appellant seems to contend the injury was caused by the explosion of the gasoline while the engine was running, appellant himself had exclusive charge of the instrumentality which caused the injury, to-wit, the flowing gasoline [Ap. 46-49]. He was certainly in a better position than appellees to know the cause of the accident.

The *Cruse* case cited *supra* was similar to the instant case in that it was an unexplained explosion case. In that case the court refused to apply the doctrine of *res ipsa loquitur* and made the significant comment that the explosion could have been caused by a spark from a wrench in the hands of the workman disconnecting the gas hose. We call the court's attention to the fact that this could very well have happened in the instant case since appellant worked with a wrench near the gasoline fumes in removing the gas cap from the tanks [Ap. 65].

Appellees further contend that while contributory negligence may not be a complete defense to an action under the Jones Act, nevertheless, the negligence of appellant prevents the application of the doctrine of *res ipsa loquitur*. One of the prerequisites to the application of the doctrine is that the injury occur without fault of the injured person. In the case cited by appellant, *Jesionowski v. Boston & M. R. R.* (1942), 67 Sup. Ct. 403, quoting from *San Juan Light & Transit Co. v. Requence*, 224 U. S. 89, the court said: "Where a thing causes injury *without fault of the injured person* (italics ours) etc." the doctrine of *res ipsa loquitur* applies.

In this case it certainly cannot be contended that appellant was without fault. Appellees submit that his action in loading the gasoline while the motors were running, when he had had experience with vessels [Ap. 65-66], amounted to wilful misconduct on his part, particularly when the same was done contrary to the orders of Austin [Ap. 83].

Appellant has gone into the question in his brief that appellees, because of the circumstances, did not supply a safe place in which to work, that is, that the vessel was unseaworthy. This contention will not warrant recovery unless it is shown first, that as a matter of fact such a situation created an unsafe place to work or rendered the vessel unseaworthy, and, second, that the situation caused the explosion. Neither of these was shown by appellant and for the reasons hereinbefore given he cannot shift the burden of going forward with the evidence regarding them to appellees but must himself prove the allegation.

In this regard the appellees further make note of the fact that appellant did not plead unseaworthiness but that he elected to proceed on negligence [Ap. 3-47]. The Jones Act requires an election of remedies.

*Pac. SS. Co. v. Peterson* (1928), 278 U. S. 130;

and appellant having elected to proceed on negligence should not be permitted now to urge unseaworthiness.

V.

**The District Court Did Not Err in Dismissing the Libel Against Both Austin and Cope.**

Appellant in his brief states that objections were raised to proceeding to trial on the cause before Austin had filed his answer. He cites pages 22 and 23 of the Apostles in support of this. A perusal of these pages indicates that no objection was made but rather that appellant declared that he was ready for trial. No question can arise regarding the action of the court with respect to Cope and we submit for the reasons hereinafter set forth, that the court had power to do what it did with respect to Austin.

At the close of libelant's case respondent moved for a "non-suit." This Honorable Court will recognize, however, from a review of the record that what was actually done was that a decree of dismissal was entered. Libelant had not made out a case against either Cope or Austin by his proofs and since it was not incumbent upon respondents to introduce any evidence, and since their story was completely told when they were called by libelant, libelant was in no way prejudiced by the court's act. No useful purpose could have been served by forcing a later hearing in the case of Austin since the issue with respect to negligence and the burden of proving the same, would have been the same. All of the facts with respect to this were represented to the court under oath and by all of the parties who could possibly know the facts. All parties involved had been examined, and pursuant to the facts as developed no liability was found to exist.

Admiralty procedure is not encumbered with the technical niceties of ordinary civil practice. There is consider-

able latitude and flexibility permitted and exercised. Justice is promoted by this approach.

3 Benedict on Admiralty 110.

No injustice or prejudice was suffered by appellant. He stated that he was prepared for trial, put on all of the evidence he had, and the court found that the same was insufficient. Appellant could not have required either of the appellees to testify or put on a case except in the manner in which they did, that is, under Rule 43(b). All of the facts in the case were presented before the court. Appellant had been given his full day in court against both Austin and Cope. How can he be heard to now complain of the fact that a motion was improperly named.

### Conclusion.

Appellees believe that the District Court properly disposed of the issues involved in the case and that the decree should be affirmed in every respect.

Respectfully submitted,

STEPHENSON, REAL & KARMELICH,

By GEORGE M. STEPHENSON,

*Attorneys for Appellees.*













